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NORTH CAROLINA REPORTS.

VOL. 96.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

FEBRUARY TERM, 1887.

REPORTED BY

THEODORE F. DAVIDSON.

(Vol. 5.)

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FEBRUARY TERM, 1887.

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ASSOCIATE JUSTICES:

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ATTORNEY-GENERAL:

THEODORE F. DAVIDSON.

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.

MARSHAL OF THE SUPREME COURT:

ROBERT H. BRADLEY.

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*Appointed by the Governor upon the death of Mr. Justice ASHE.

108068

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ERRATA.

On page 83, line 6 of the opinion, for "respectable" read "responsible."

On page 255, line 4 of the opinion, for "proven" read "proved."

On page 259, line 17, for "divisions" read "decisions."

On page 343, line 8, for "partly" read "purely."

On page 343, line 16, for "where" read "when."

On page 348, line 3, for "cause" read "course."

On page 360, line 8 of the opinion, for "covenant" read "convenient."

On page 360, line 12 of the opinion, for "indebtedness" read "deduction"

On page 377, line 15, omit "and."

On page 379, line 11, for "therefore" read "thereupon."

On page 384, line 25, for "encounters" read "suffers"

On page 466, line 18, for "nerved" read "moved."

On page 532, line 7, insert "not" after "do."

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

FEBRUARY TERM, 1887.

JOHN F. McLEAN v. THE CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

Common Carrier—Contract—Interstate Commerce—Jurisdiction—Penalty.

1. A contract with a railroad company to carry freight from a place within this State to a place within another State at a fixed price for the entire route, the price thus charged being greater than that required from others for same service, is not embraced by the provisions of §1966 of *The Code*.
2. Such a contract is also a matter affecting interstate commerce, the control of which is vested exclusively in Congress.

(*McGwigan* v. *Railroad*, 95 N. C., 428, cited and approved).

CIVIL ACTION, tried at February Term, 1886, of IREDELL Superior Court, before *MacRae, Judge*.

In deference to an intimation of his Honor, at the close of the testimony, that he was not entitled to recover, the plaintiff submitted to a nonsuit and appealed.

Messrs. W. M. Robbins and *B. F. Long*, for the plaintiff.
Messrs. D. Schenck and *Charles Price*, for the defendant.

SMITH, C. J. The action is prosecuted against the defendant company as the lessee of the Atlantic, Tennessee and Ohio Railroad Company, in possession of and operating its road, to recover the penalty given in §1966 of *The Code*. In view of our decision in *McGwigan* v. *Railroad*, 95 N. C., 428, it becomes unnecessary to consider the particular rulings in the Court below shown in the record and intended for review in the appeal, since the same fundamental difficulty lies in the way of maintaining the action, as in other similar cases. The complaint discloses a case where the contract was for the transportation of the goods from Mooresville on the road, to the city of Philadelphia, at a fixed price for the whole route.

It is not, therefore, within the terms of the statute, and if it were, the carriage comes within interstate commerce, the regulation of which vests exclusively in Congress. This action must be dismissed at plaintiff's costs.

No error. Affirmed.

WILLIAM P. WHITTAKER and wife v. THOS. N. HILL, Trustee, and W. W. GWATHMEY & CO.

Deed in Trust—Injunction.

Where the complaint states facts sufficient to authorize a temporary injunction, and the answer raises serious issues, the determination of which is doubtful, it is not error to continue the injunction till the hearing upon the merits, especially when it appears that the subject matter of the action will remain unimpaired.

(*Harrison* v. *Bray*, 92 N. C., 488; and *Turner* v. *Cuthrell*, 94 N. C., 239; cited and approved).

CIVIL ACTION, heard before *Shepherd*, *Judge*, at March Term, 1886, of HALIFAX Superior Court, upon complaint,

answer, affidavits, &c., to dissolve an injunction thereto granted, to restrain the defendants from selling certain lands conveyed to secure the payment of debts by the defendants. His Honor refused to dissolve, and continued the injunction to the hearing. The defendants appealed.

Mr. Walter E. Daniel, for the plaintiffs.
Mr. Thos. N. Hill, for the defendants.

MERRIMON, J. The plaintiffs, in their verified complaint, allege, as the ground of the equitable relief they demand, that the debt specified in and secured by the deed of trust under which the defendant trustee is proceeding to sell the land, which it purports to convey to him in trust, has been fully paid by the proceeds of the sale of a part of the personal property and cotton of the crop conveyed by that deed, and as by its terms and effect provided. They further allege, that the land mentioned is all that the husband plaintiff owns and had at the time the deed was executed, and that it is not worth more than $1,000, and he is entitled to have his homestead therein allotted to him. It is further alleged, that the *feme* plaintiff was at the time she purported to acknowledge the execution of the deed of trust mentioned, the wife of her co-plaintiff—that she was then under the age of twenty-one years, and will not attain her majority until the ninth day of February, 1888; and that the deed mentioned is inoperative and void as to the land embraced by it, because this land constituted the homestead of the plaintiffs.

The defendants in effect confess and avoid the alleged cause of action. They admit that they received the money, the proceeds of the sale of the personal property, including the cotton, as alleged in the complaint; but they aver that in the latter part of the crop year of 1884, at the request of the husband plaintiff, they advanced to him money to

enable him to gather his crop, with the understanding and the agreement on his part with them, that the unsecured debt thus created by him should be paid from the proceeds of the crop before any part of the secured debt mentioned should be paid; that in pursuance of this agreement, they applied so much of the proceeds of the cotton as was necessary to pay the unsecured debt, and they allege that there is a balance of $462.48 and interest, of the debt embraced by the deed of trust, yet unpaid.

The action seems to have been brought in good faith, and if the complaint be taken as true, the husband plaintiff is entitled to relief by injunction The defendants, however, while admitting the material facts stated in the complaint, allege other facts, which, if true, seriously put in question the plaintiff's right to the relief sought.

The letters of the husband, put in evidence by the defendants, tend strongly to show that he did agree to pay the unsecured debt as alleged by the defendants. The amount of this debt is not stated, as agreed to by him, nor does he admit that he received the statement of account rendered, or its correctness. The matters of fact at issue are not entirely free from doubt, and besides, important questions of law are raised that ought not to be decided until the action shall be tried upon the merits.

In such cases, the injunction will be continued until the hearing upon the merits, especially when it appears, as it does in this case, that the security will remain unimpaired. *Harrison* v. *Bray*, 92 N. C., 488; *Turner* v. *Cuthrell*, 94 N. C., 239.

There is no error. Let this opinion be certified to the Superior Court according to law.

No error. Affirmed.

The State on the relation of M. F. SKINNER v. A. J. BATEMAN et al.

Bond, Official—Schools—Statute—Treasurer.

1. The effect of the Acts of the General Assembly of 1883 and 1885 in relation to a graded school in Edenton, was to supersede the organization of the school district within the same territory, and confer all the powers theretofore exercised by the school committee under the general law and transfer all moneys then in the treasury to the trustees created by said special enactments.

2. The school committee for the superseded district had no authority to contract or give orders for the payment for teaching a school therein after the passage of the Acts of 1883 and 1885; and it was no breach of the county treasurer's bond to refuse to pay upon their order, although at the time he had moneys in his hands apportioned originally to said district.

(*Puett* v. *Commissioners*, 94 N. C., 709, cited).

CIVIL ACTION, tried before *Gudger, Judge,* at Spring Term, 1886, of CHOWAN Superior Court.

A jury trial was waived, and judgment having been pronounced upon the facts found by the Court, the plaintiff appealed.

The plaintiff was employed by the school committee of district No. 3, in Chowan, for the free education of white children, to teach therein for four months, terminating on January 30, 1885, at a compensation of twenty-five dollars per month. Having completed her contract on the day mentioned, she applied for and obtained from the committee an order on the county treasurer, the principal defendant, A. J. Bateman, for the money due for her services, he then having funds received from his predecessor in office sufficient for the purpose, and payment was refused. Thereupon she instituted the present action on the treasurer's official bond against him and the other defendants, his sureties, to recover in damages the amount specified in the order.

The defence rests upon the alleged effect of three several acts of the General Assembly, ratified respectively on March 3d, 1883, January 19th, 1885, and February 25th, 1885, whereby the territory constituting the said third district is made a graded school district for the instruction of the same class of children which, it was insisted, displaced and superseded the former district and converted it into a graded school district with enlarged means of usefulness, and hence the plaintiff's employment was unauthorized and the fund not liable to the orders of the said school committee.

The act of March 3d, 1883, forms the graded school district and places the school under the management of a board of trustees who are authorized (§3) "to employ teachers and do all such acts as shall be necessary to carry on said graded school, and shall be the custodian of all public school property for the white race of said school district."

Section four, more explicit in its bearing upon the matter in controversy, enacts:

"That all public school money which shall from time to time be collected under the general school law for the white race of said school district, and all special school taxes which may from time to time be collected from white persons in said school district, shall be applied for keeping up the said graded school for white children under the orders and directions of said board of graded school trustees for the white race."

A similar provision is made for a graded school for colored children, and then it is enacted that "the treasurer of Chowan and the sureties on his official bond" shall become "responsible for the proper disbursement of all moneys collected under this act," §8.

This enactment was repealed at the session of 1885, and another act, entitled "An act to establish the Edenton Graded School," ratified on the 19th day of January, (Acts 1885, ch. 7,) substituted in its place, in which certain dis-

criminating features in the former, supposed to be obnoxious to the Constitution, and since held to be in *Puett* v. *Commissioners*, 94 N. C., 709, are omitted. The essential provisions of this act, so far as they affect the present controversy, may be thus summarized: The Edenton graded school for School District Number Three, of Chowan county, for the white race, is incorporated, and its functions to be exercised by a board of trustees who are to organize by the appointment of a president, secretary and treasurer, of whom the latter is to have charge of the funds, except the public funds in the custody of the county treasurer," §§1 and 2.

The trustees have authority to employ and pay teachers, &c., and "to do all such acts as may be necessary to carry on said school and to secure its good order," and *all powers and duties formerly* vested in the school committee for the white race of said district are vested in said board," §3.

Section four we quote in full: "The said board shall be custodian of all public school property for the white race of said district, and all unexpended public school money which has been apportioned or collected for the white race of said school district, under the general laws of the State, not applicable to contracts heretofore legally made, and all of (the last word is stricken out by the amendatory act of February 25th, ch. 138,) which shall hereafter from time to time be so collected or apportioned, shall be applied for keeping up said graded school, under the orders and directions of said board, and the treasurer of Chowan county shall pay out the same on the order of said board, approved and signed by its president and secretary; but no order shall be given on the county treasurer until the service or property for which it is given has been furnished in full, and the public funds appropriated to said school shall be drawn from the county treasury at the rate of one tenth thereof for each month the school may have been in operation."

Mr. Charles M. Busbee, for the plaintiff.
Mr. John Devereux, Jr., for the defendants.

SMITH, C. J., (having stated the case). We think it manifest that the funds in the county treasurer's hands are withdrawn from the control of the committee of the former school district, and at the time when they undertook by their order to appropriate the required sum to the plaintiff's demand, their authority had ceased, and that money, as well as that derived from other sources, was intended to be used in the support of the supplanting graded school with its greatly improved advantages for gratuitous education. This is certainly so, unless a different result is produced by the qualifying words following the transfer of the funds collected under the general law, "not applicable to contracts heretofore legally made." Does this clause save the present contract and warrant its payment in the manner adopted?

In our opinion the committeemen were disabled to engage a teacher or to pay one after the act of 1883 was passed, the evident purpose of which is to adopt the facilities for a better education, supplied by a graded school, which, with the means at the disposal of the trustees, it was hoped would be kept up for forty weeks in the year; ch. 220, sec. 4.

It could not have been intended to cripple the latter by a continuance of the former district school and the use of the funds in its support. All the resources for the maintenance of the substituted graded school were required, and hence the action of the committee in keeping in operation the other school was unauthorized.

Besides, this section simply means not that the funds shall remain in the defendant's hands for disbursement in meeting pre-existing valid contracts, but that such contracts must be paid before the moneys can be used for the graded school. The transfer is subject to the incumbrance. Still it must pass into the hands of the new depository, and in his hands

is first applicable to the antecedent obligations incurred, and then to the use of the graded school. Hence, there was no breach of the defendant's bond in refusing to recognize the authority of the committee to direct the payment whose functions had been wholly withdrawn.

If the plaintiff has any redress she has not pursued the proper course to obtain it, but should make her demand of the trustees, and we do not mean to intimate that her claim upon the fund is valid.

We therefore concur in the ruling of the Court that the plaintiff cannot recover, and in dismissing the action at the appellant's costs.

No error. Affirmed.

W. H. THOMPSON v. SALLY ONLEY.

Appeal—Contempt—Bond—Endorsement—Evidence—Possession.

1. Where, upon the trial, a party to the action was ordered to surrender the possession of a paper to the custody of the Court, and refusing, was committed for contempt, and thereupon obeyed the order and was set at liberty, but excepted and appealed; *Held*, (1) that such a refusal was a contempt; (2) that as the appeal presented only an abstract question of the power to make the order, it should be dismissed.
2. The bare possession of a bond or note, unendorsed, by a stranger, does not raise a presumption that it is the property of the person having possession.
3. To give title to a note or bond, an endorsement or assignment is not necessary.
4. To exclude the testimony of a party to an action upon the ground that it related to a transaction between the witness and a deceased person, it must appear that the knowledge of the witness was derived from a personal transaction with the deceased person.

(*Lockhart* v. *Bell*, 86 N. C., 449, and s. c., 90 N. C., 499; *Sikes* v. *Parker*, 95 N. C., 232; *Holly* v. *Holly*, 94 N. C., 670; cited and approved).

The orders and judgment from which defendant appealed were made by *Gudger, Judge,* at Chambers, on the Spring Circuit, 1886, of the First District. The issues joined upon the pleadings were tried before *Shipp, Judge,* and a jury, at Fall Term, 1886, of PASQUOTANK Superior Court. From the verdict and judgment then rendered the plaintiff appealed.

The appeals were docketed and argued separately, and the opinions were filed separately, but for convenience of reference they are reported under one title.

PLAINTIFF'S APPEAL.

The action was prosecuted by the plaintiff as administrator of Joshua Lowe, to recover possession of a note, under seal, executed by William J. Harrall to the intestate, on January 14, 1882, and due, with interest from January 1, 1881, on January 1, 1883, in the sum of four hundred dollars.

The note was given, as appears on its face, to secure the residue of the purchase money for a tract of land bought of the intestate; and the defendant being in possession and claiming it as her property, refused to surrender it on the plaintiff's demand.

During the pendency of the action the plaintiff obtained an order from the clerk, made in pursuance of §323 of *The Code,* in the following terms:

"*To the Sheriff of said County—Greeting:*

You are hereby commanded to proceed forthwith to take into your possession from defendant in the within cause, Sallie Onley, the property described in the complaint and affidavit, and upon the plaintiff entering into good and sufficient bond of $1,000, you will deliver the same to him or his agent."

Under this process the sheriff made demand of the note, and the defendant, admitting her possession, refused to sur-

render it. Thereupon, and on proof of these facts, his Honor, Judge Gudger, then presiding in that District, issued a rule requiring the defendant and Timothy S. Onley, her brother, who advised her not to deliver up the note until she could consult counsel, "to appear before him at Chambers, in Gatesville, on April 5th, 1886, to show cause why the said note shall not be surrendered and deposited in Court, or they attached for contempt for refusing to obey the order of the Court."

The parties did so attend and answer, and upon the hearing this order was made:

"This cause coming on to be heard this day upon plaintiff's motion against the defendant and Timothy S. Onley, of which they have had due notice, to show cause why the defendant shall not deliver to the sheriff of Pasquotank county the bond described in the original affidavit in this cause, dated ____, 1885, as required by the order of the Court of ____, 1885, or be attached for contempt of Court in refusing to obey said order, and it appearing to the Court by the admission of the respondents that defendant at the time the said sheriff demanded the bond, under said order, was in possession of the same, and had the actual control and custody thereof, but wrongfully refused to deliver the same to the said sheriff, and was actively counseled and advised so to refuse, by the respondent, Timothy S. Onley; and it further appearing and being found by the Court, that the said defendant now on the hearing of this motion, has the said bond in her possession and control, and is ordered by the Court at once to put the same in the custody of the Court, but refused and still refuses so to do; it is ordered by the Court that the said defendant, Sallie Onley, and the respondent, Timothy S. Onley, be committed to the common jail of the county of Gates, there to be held till they comply with the order of the Court, by delivering the said bond to the Court or to the said sheriff of Gates to be delivered to the Court, or until the further order of this Court.

It is further ordered that the respondent pay the cost of this motion."

Thereupon the defendant surrendered the bond in open Court, and it was ordered to be deposited with the clerk for safe keeping until further direction of the Court.

From the above judgment and orders the defendant appealed.

DEFENDANT'S APPEAL.

On the trial before *Shipp, Judge*, by consent, the following issues were submitted to the jury:

Is the plaintiff the owner of and entitled to the possession of the note or bond in controversy? To this inquiry the response was in the negative.

In support of his claim the plaintiff took the note from the officer and read it to the jury. It was unendorsed. This was the only evidence offered by him. The defendant, examined on her own behalf, testified that she had seen the note before; that it was in her possession at the commencement of the action and so remained until delivered up by the command of the Court; and that it was her own property.

The Court instructed the jury, that the note or bond being payable to Lowe, the plaintiff's intestate, and not endorsed by him, it was *prima facie* the property of the plaintiff, nothing else appearing, and that the defendant's possession does not raise a presumption that the note or bond is the property of the defendant.

The Court further charged the jury, that the defendant testified that the note or bond was in her possession at the institution of this action and up to the time it was taken from her and impounded in the clerk's office by order of this Court, and that she is the owner of said note or bond, and that the same is her property. The Court charged the jury it was simply a question of ownership; that to give

title to a note or bond an endorsement or assignment is not necessary, and that it is a matter of fact for the jury to decide, and that if the jury believe the testimony of the defendant, the plaintiff is not entitled to recover.

The plaintiff excepted to the charge, and from the judgment rendered for the defendant, appealed.

Messrs. John Gatling and *W. D. Pruden*, for the plaintiff.
Mr. C. W. Grandy, for the defendant.

SMITH, C. J., (after stating the case):

PLAINTIFF'S APPEAL.

The instruction complained of is in entire accord with the law as declared in *Holly* v. *Holly*, 94 N. C., 670.

The appellant's counsel suggests that the defendant's testimony necessarily involves a transaction with the intestate's payee, since by his act alone could the property in the note be divested so as to pass to another; and hence it comes within the inhibition of §590 of *The Code*.

To this objection the answer is obvious and direct.

I. No exception to the admission of the testimony was taken.

II. It cannot be seen that the only source of the witness's information was "a personal transaction or communication *between her and the deceased*."

III. The plaintiff, if he wished to have the evidence ruled out for the reason suggested, could have interrogated the witness as to the facts in a preliminary inquiry, in order to sustain his proposed exclusion should it be that the only knowledge or information possessed by the witness was derived from personal intercourse with the deceased. *Lockhart* v. *Bell*, 86 N. C., 449, and same case, 90 N. C., 499; *Sikes* v. *Parker*, 95 N. C., 232.

It must be declared that there is no error in the ruling, and the judgment restoring the note to the defendant must be affirmed.

No error. Affirmed.

DEFENDANT'S APPEAL.

Without adverting particularly to the question discussed by appellant's counsel, whether the refusal to accede to the sheriff's demand of the note was in strictness a contempt as offering a resistance wilfully to a lawful process of the Court, *The Code*, §648, paragraph four, the order for the surrender of the note, at the hearing, disobeyed while it was in the power of the appellant to comply, warranted the commitment as a means of forcing compliance; and as this result was at once obtained, the order of imprisonment was exhausted and the appellant set at liberty.

There was consequently no practical benefit to be sought by an appeal, and an abstract question only is presented, that is, as to the right of the Judge to require the surrender of the paper to the custody of an officer of the Court.

The costs, as incidental to the judgment, must follow its disposition. The appeal of the defendant, as wholly unnecessary, must be dismissed.

Dismissed.

JAMES H. MITCHELL, Adm'r d. b. n. of E. J. MITCHELL, v. WILLIAM P. MITCHELL et al.

Action, Joinder of—Division of—Demurrer—Pleading.

1. A cause of action against a clerk of the Superior Court for damages resulting from malfeasance in accepting an insufficient bond from

an administrator, cannot be joined with a cause of action against such administrator and his sureties for a *devastavit*, the respective liabilities of the parties having no connection. *The Code*, §267.

2. The provision of *The Code*, §272, authorizing the Court to direct a division of improperly joined *causes* of action, does not extend to the cases where there is also a misjoinder of *parties* to the action.

(*Brown* v. *Cobb*, 76 N. C., 391; *Logan* v. *Wallis*, Ibid, 416; *Street* v. *Tuck*, 84 N. C., 605; *Burns* v. *Williams*, 88 N. C., 159; *Morris* v. *Gentry*, 89 N. C., 248; cited and approved).

CIVIL ACTION, tried upon complaint and demurrer, at Fall Term, 1885, of BERTIE Superior Court, before *Connor, Judge.*

It was alleged, in substance in the complaint, that E. J. Mitchell died intestate in the county of Bertie, prior to November of 1861, and that Stark B. Smith was appointed administrator of his estate on the 1st day of that month, and took possession of the personal property of his intestate, and afterwards died in August of 1867, before completing the administration of the estate in his hands; that thereafter, Abram Holder was appointed administrator *de bonis non* of said estate, and he also dying before completing the administration, in October, 1881, W. P. Mitchell, the defendant, was appointed administrator *de bonis non*, and before completing administration thereof, he was for cause removed as such administrator, and the plaintiff was appointed administrator *de bonis non* in his stead; that the defendant W. P. Gurley was Clerk of the Superior Court and Judge of the Court of Probate of the county named, from 1869 until January of 1881, and while exercising probate authority he appointed the said W. P. Mitchell such administrator *de bonis non*, as above stated, and took from him a bond in that behalf for only the sum of $2,000, when he well knew that the assets of said estate that ought to pass into the hands of said Mitchell as such administrator were of the value of at least $6,000; that in so taking said bond, he was grossly negligent and guilty of misfeasance in office, &c.

The plaintiff brought this action against the said W. P. Mitchell and the sureties on his bond as administrator, alleging breaches of the conditions thereof, and demanding an account of assets that were or ought to have gone into his hands, &c.; and also against the defendant Gurley as clerk of said Court, demanding judgment against him for the balance of the amount ascertained to be due from said W. P. Mitchell as administrator aforesaid, above the sum of $2,000, the amount of his bond.

The defendants demurred to the complaint, and assigned as grounds of demurrer: *first*, a misjoinder of parties defendant; *secondly*, that several distinct causes of action had been misjoined, one being an alleged cause of action against the defendant Mitchell and the sureties of his bond for alleged breaches of the conditions thereof, and another, against the defendant Gurley, as clerk, &c., for accepting an insufficient bond, &c.

The Court below sustained the demurrer, and granted leave to the plaintiff to proceed in this action against Mitchell and his sureties, and against the defendant Gurley in a separate action.

From this judgment the plaintiff appealed to this Court.

Mr. R. B. Peebles, for the plaintiff.
----------, for the defendant.

MERRIMON, J., (after stating the facts). We do not doubt that the Court properly sustained the demurrer. It is plainly to be seen that the plaintiff undertook to unite in the same action two separate and distinct causes of action that may not be so united against different parties in no way connected with each other in such respect.

The first cause of action alleged is against the defendant Mitchell and his sureties for the alleged breach of the conditions of his bond as administrator *de bonis non*, in that he,

having been removed as such administrator, failed to surrender to and account with the plaintiff for the assets of his intestate that came and ought to have come into his hands.

The cause of action was in no legal sense connected with the alleged cause of action against the defendant Gurley—the latter was not a surety of the bond sued upon—he had no part of and was not chargeable with the assets of the intestate in any respect or manner.

The second cause of action—that alleged against Gurley—was for gross neglect and malfeasance in office as clerk of the Superior Court, in failing to require the defendant Mitchell to give a bond as administrator *de bonis non* in a sum sufficient in amount.

This was a matter separate and distinct from the alleged breaches of the conditions of the bond given, and had no connection with the cause of action in that respect. The defendant Mitchell and his sureties are not charged with having anything to do, or with being responsible for the neglect and malfeasance in office of the defendant Gurley.

The alleged liabilities of the parties respectively are distinct, and, as causes of action, have no connection with each other, nor are the defendants jointly or in common answerable to the plaintiff in such respects.

Comprehensive as are the provisions of the statute (*The Code*, §267,) allowing several causes of action to be united in the same action, it does not extend to and embrace distinct causes of action against different persons having no substantial connection with each other in respect of such causes of action. It does not provide for the consolidation of all sorts of causes of action in the same action, nor does it allow two or more different persons to be sued in the same action in respect of distinct causes of action where there is no joint or common liability among them.

To allow this, would be practically to allow the consolidation of two or more distinct actions as to parties and the

causes of action, into one. Such procedure and practice would not only be impracticable, but it would lead to confusion, and result in injustice to litigants. Different causes of action in favor of and against different parties must be litigated in different actions. *Brown* v. *Coble*, 76 N. C., 391; *Logan* v. *Wallis*, Ibid., 416; *Street* v. *Tuck*, 84 N. C., 605; *Burns* v. *Williams*, 88 N. C., 159.

The Court ought not, however, to have made the order dividing the action into two actions, granting the plaintiff leave to proceed properly in each, because there was a misjoinder of two distinct causes of action, and as well, a misjoinder of parties defendant. The authority to direct and make such division is conferred by statute, and it (*The Code*, §272,) provides that, "If the demurrer be allowed for the reason that several causes of action have been improperly united, the Judge shall, upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned." The power thus conferred can be exercised only in cases when there is a misjoinder of several causes of action—it does not extend to cases in which there is both a misjoinder of several causes of action and likewise a misjoinder of parties. In the latter case, it would seldom be practicable to divide the action. The statute has not provided that it may be done.

The Court properly sustained the demurrer. It improperly directed a division of the action. It should have dismissed it, unless upon application of the plaintiff it had allowed him, upon just terms, to amend as to parties and the pleadings.

To the end the plaintiff may have opportunity to apply for leave to amend, the case must be remanded, with instructions to modify the judgment as here indicated, unless the plaintiff shall obtain leave and make proper and necessary amendments. *Morris* v. *Gentry*, 89 N. C., 248.

Error. Remanded.

HATTIE V. TATE et als. v. J. J. MOTT et als.

Judicial Sales—Infants—Jurisdiction—Parties Judgment—Estoppel.

1. The Superior Courts have succeeded to all the jurisdiction of the late Courts of Equity in respect to infants, and they have authority to direct sales of their property, both real and personal, in proper cases.
2. The guardian or next friend of an infant is not, properly speaking, a party to the action, although his name appears in the record.
3. The next friend of an infant ought always to be appointed by the Court, and really he is an officer of the Court, and under its supervision and control.
4. The Court has power, for good cause shown, to remove the next friend of an infant litigant, and appoint another as often as may be necessary.
5. It is not essential that the infant should know that an action has been brought in his favor by a next friend, as his incapacity to judge for himself is presumed, but the Court may inquire into the propriety of the action and take such steps as may be necessary.
6. Where an infant sues by a next friend he is as much bound by the judgment as an adult, and this rule applies to non-resident as much as to resident infants.
7. A judgment for or against an infant, when he appears by attorney, but has no guardian or next friend, is not void, but only voidable.
8. A guardian appointed in another State has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian it will be treated as if he were next friend.
9. So, where non-resident infant tenants in common filed an *ex parte* petition to sell land for partition, by their guardian, who was a non-resident; *It was held*, that the decree of sale was not void, and could not be attacked collaterally.

(*Williams* v. *Harrington*, 11 Ired., 616; *ex parte Dodd*, Phil. Eq., 97; *Sutton* v. *Schonwald*, 86 N. C., 198; *Morris* v. *Gentry*, 89 N. C., 248; *White* v. *Albertson*, 3 Dev., 241; *Marshall* v. *Fisher*, 1 Jones, 111; *England* v. *Garner*, 90 N. C., 197; *Turner* v. *Douglass*, 72 N. C., 127; cited and approved).

TATE *v.* MOTT.

CIVIL ACTION to recover land, tried upon a case agreed, before *Boykin, Judge*, at Fall Term, 1886, of IREDELL Superior Court.

The question of title only was tried, it being agreed by the parties that the damages for rents and profits should be reserved until the question of title was settled.

It appears in the record, that William S. Tate died intestate in the county of Iredell in 1879, seized of the land presently to be mentioned, leaving surviving him a widow, the plaintiff Cora M. Tate, and numerous children, all under the age of twenty-one years, except one: that after the death of her husband, the widow removed to the State of South Carolina, taking her children with her, and in 1881, Samuel J. Douthit was appointed guardian for these infants in that State.

It further appears, that in August, 1881, the widow named above, her daughter of age, and the guardian in South Carolina named, employed counsel in the county mentioned, and brought their *ex parte* special proceeding in the Superior Court of that county, in which the widow and her children, including the infants, filed their petition, the latter by the said Samuel J. Douthit, purporting to be their guardian in South Carolina.

In this petition it was alleged, that the said children were the heirs at law of the said intestate; that the said Douthit had been duly appointed guardian of the infants named therein; that the petitioners, except the widow, were each entitled to an undivided one seventh of the land specified and described, subject to the dower of the widow, and she was a petitioner as to her right as doweress; that the land was of the value of about $2,045; that the infants had no other income; that the houses on the land were going to decay and ruin; that the petitioners desire a sale of the land to be made under the order of the Court; that their respective rights be ascertained, and the share of each of the infants in the

proceeds of sale be paid to the said guardian, to be invested for them in South Carolina, and that they had no general or special guardian in this State. The prayer was for a sale of the property, an account, that the several sums due the parties of age be paid to them, and those due the infants be paid to the said guardian, &c.

Thereupon, there was an order of sale, and a commissioner appointed to advertise and sell the land. This order was approved by the Judge. Thereafter, there was a sale of the land, and the defendant W. M. Cooper became the purchaser at the price of $1,435. The commissioner reported the sale, and that the land sold for its full and fair value. This report was confirmed by the Court, and likewise affirmed by the Judge

Thereafter, the purchase money was paid, and the commissioner was directed by the Court to make title to the purchaser, which was done, and the order in this respect was also affirmed by the Judge.

Afterwards, the said purchaser sold and conveyed the land to the defendant Mott, and they had only the notice of the rights of the petitioners that they derived, or might have derived, from the record of the proceedings of the Court in connection therewith.

The present plaintiffs are the children and heirs at law of said William S. Tate, deceased, and they bring this action to recover possession of the land mentioned in the petition above referred to and sold as stated. They allege that the petition and the proceedings of the Court in connection therewith, including the orders, decrees and sale of the land, were null and void; that the Court had, as to that proceeding, no jurisdiction of them, they being at the time residents of the State of South Carolina; that the said Douthit, who professed to represent them as their guardian, had no authority to do so in this State; that they have not received the money for which the land was so sold; that the same has

been paid into Court; that the defendants had knowledge of their infancy, and that they were non-residents of this State, &c. They demand judgment for the possession of the land; that the sale thereof, and all orders and decrees in relation thereto, and the deed executed by the commissioner of the Court, be cancelled and declared null and void; that they recover damages and costs, and pray for general relief. It is not alleged that the land did not sell for its full and fair value, nor is fraud alleged, nor is it alleged that the plaintiffs have in any respect suffered injury in the result of the sale of the land, or that they may yet so suffer.

The Court held that the said petition, and all proceedings of the Court in that connection, were void, and gave judgment for the plaintiffs, from which the defendants appealed to this Court, assigning as error the decree of the Court that such proceedings were void.

Mr. Johnstone Jones filed a brief for the plaintiffs.
Mr. R. F. Armfield, for the defendants.

MERRIMON, J., (after stating the facts). Under the prevailing system of judicature in this State, the Superior Courts have succeeded to and possess the jurisdiction and power of the late Courts of Equity in respect to infants and their property; and there can be no question that these Courts have authority in all proper cases to direct a sale of their property, both real and personal, for their benefit and advantage. *The Code*, §§1602, 1603; *Williams* v. *Harrington*, 11 Ired., 616; *ex parte Dodd*, Phil. Eq., 97; *Sutton* v. *Schonwald*, 86 N. C., 198; *Morris* v. *Gentry*, 89 N. C., 248.

Generally, an infant can maintain an action if he has a just cause of action, just as an adult may do, the only difference being in the mode of conducting it. His action must be brought and prosecuted in his own name, and it is in all

respects his, just as if he were of full age; but it must be managed and prosecuted, not by himself, but by his guardian or next friend, under the supervision and control of the Court. This is necessary, because of his presumed lack of discretion and want of capacity to understand and manage his own affairs, his inability to bind himself and to become liable for costs. The infant is in an important sense under the protection of the Court; it is careful of his rights, and will, in a proper case, interfere in his behalf, and take, and direct to be taken, all proper steps in the course of the action, for the protection of his rights and interests.

The guardian or next friend is not in a legal sense a party to the action, although his name appears in the record.

The next friend is, or ought always to be, appointed by the Court; he is really its officer, under its supervision and control, appointed for the purpose of bringing and managing the action, and taking care of the infant's rights and interests in and about it. The Court always desires to appoint a person who is friendly to and will take an earnest and active interest in his case. It is therefore usual to appoint his near relation, who, it is supposed, cares particularly for his good; but as it sometimes happens that such relation may have some interest adverse to his, or be unfriendly to him, the Court may, in its sound discretion, designate any discreet and fit person to act as next friend. The next friend should always be selected with care, having in view only the infant's best interests, and substantially in the way suggested in *Morris* v. *Gentry*, 89 N. C., 248. And as the Court appoints and has control of the next friend, if it should find him untrustworthy, or for any just cause unfit for such purpose, it may and ought to remove him and appoint another in his stead, and this may be done repeatedly for just cause. *Morris* v. *Gentry, supra; Bank* v. *Richie*, 8 Pet., 128; *Nalder* v. *Hawkins*, 2 Mylne & Keene, 243; *Mor-*

gan v. *Thorn*, Mees & W., 400; Story's Eq. Pl., §§57–59; Tyler on Inf. Cov., §§132–139; 1 Williams on Ex'rs, 98–101.

Ordinarily, for the reasons already stated, an infant does not himself bring his action, and thus put himself in relation with and submit to the jurisdiction of the Court. This is done by his guardian, if he has one, or if he has none, then by his next friend, who regularly obtains leave of the Court to bring the action, although, under a loose and vicious practice that too much prevails, and which ought to be discouraged by the Courts, such actions are sometimes brought without such permission, and are recognized and treated by the Court as if they had been regularly and properly begun. As the infant is presumed to be incapable of acting for himself, he must thus go into Court by his next friend designated by the Court, and submit to its jurisdiction. Otherwise he could not properly bring and maintain an action at all. Nor is it essential that he should know that the action is brought. Because of his presumed incapacity, the guardian or next friend must determine the necessity for and the propriety of bringing it; but the Court may inquire into the propriety of it, and take such steps as it may deem necessary in that respect.

The Court cannot entertain an action without getting jurisdiction of the parties plaintiff and defendant to it, as well as the subject matter of it. It would be a ridiculous mockery for the Court to profess and pretend to settle and adjudge the rights of parties in an action, leaving the plaintiff free to repudiate the judgment at his will and pleasure. When an infant thus brings his action, the Court has jurisdiction of him, just as if he were an adult plaintiff, and orders, judgments and decrees entered in the course of it are binding and conclusive upon him, while they remain unreversed. And generally, any infant may thus bring his action, if he has good cause; and it makes no difference that he is a non-resident of this State. The Courts are open

to non-resident infants as well as non-resident adults—there is no reason why this should not be so, and there is neither principle nor statute that forbids it. Indeed, it is necessary that they should have such rights. A non-resident infant may own property in this State and have important rights in a great variety of ways. Surely, the Courts are open to him, just as to other people. And when he goes into the Courts to assert and vindicate his rights, he must go as resident infants must do, and be bound by the orders and judgments of the Courts as they are bound. There can be no difference between the two classes of litigants.

A judgment for or against an infant when he appears by attorney, and without guardian or next friend, is not void. It is only voidable, and remains operative until it shall, in a proper way, be reversed. His incapacity is personal to himself, and he is not bound to avail himself of his disability—he may waive his right in this respect. If he fails to insist upon it in the original action, or by some direct proceeding, such as writ of error, *coram nobis*, or *audita querela*, or the like proper proceeding, he cannot afterwards insist upon his disability in an action upon, or other proceeding to enforce the original judgments against him. And no more can he repudiate or rid himself of a judgment in his favor in an *ex parte* proceeding, instituted by himself and others for his benefit, if he should afterwards find that he might gain advantage by such course. Such a judgment might be erroneous or irregular, but it would not be void—it would remain in force until reversed in a proper way. *White* v. *Albertson*, 3 Dev., 241; *Williams* v. *Harrington*, *supra*; *Marshall* v. *Fisher*, 1 Jones, 111; *England* v. *Garner*, 90 N. C., 197; *Turner* v. *Douglass*, 72 N. C., 127; Ewell's Lead. Cases on Infancy, &c., pp. 234, 235, and numerous cases there cited.

In this State, the statute (*The Code*, §180,) provides that infants and certain other classes, whether residents or non-residents, when they sue in the Courts, shall appear by their

general or testamentary guardian, if they have one within the State, and if there shall be no such guardian, then they may appear by their next friend.

It was therefore competent for the mother—the widow—her adult daughter and the infant plaintiffs, although non-residents, to bring their *ex parte* special proceeding to sell the land in question, the orders, judgments and other proceedings in which they seek by this action to have adjudged void. Regularly, however, as the infants had no guardian in this State, a next friend for them in that connection should have been appointed before the petition was filed, by whom they should have appeared in Court. But they purported to appear by their guardian appointed in South Carolina, who, with the approval of their mother and adult sister, assumed to act in that behalf. Although he professed to act as such guardian, he could not, and did not, do so in contemplation of law, because he had no authority as guardian in this State. The Court nevertheless recognized the appearance of the infants by him and took jurisdiction of them and the subject matter of the proceeding, and thus, in legal effect, treated him as their next friend. He, the mother of the infants, and their sister of full age, brought their proceeding and employed counsel to conduct the same. The Court took jurisdiction, granted the prayer of the petition, the land was sold, the purchase money therefor was paid, the sale was confirmed, and the title conveyed to the purchaser, and the orders and judgments made by the Court to that end passing under the direct supervision of the Judge, and receiving his signature, as required by the statute in such cases. Though the proceeding was irregular in some respects, and erroneous in others, unquestionably it was not void. The Court had jurisdiction of the parties and of the subject matter. If there had been no next friend of the infants, the orders and judgments would not, on that account, be void—at most, they would only be voidable. But there

was in effect a next friend, recognized and treated as such by the Court. It must be so taken, because, the Court, seeing that the infants appeared by one purporting to be their guardian in South Carolina, and who acted in their behalf, took action as if he were their next friend in the proceeding. Although such action of the Court was irregular, it was not void. It ought to have made the proceeding regular by proper amendatory orders, entered of record, or else it ought to have dismissed it. Still, the Court did what it had power to do, and therefore its acts were not void. The mere fact that the person who was so recognized and acted as next friend was a non-resident of this State, did not render his acts as such void. As we have seen, he was not a party to the proceeding. He was the recognized officer of the Court in that respect, under its control and direction. The Court might—perhaps ought, to have removed him and appointed a regular next friend in his stead, but what he did was not void—it served the purpose of a proper proceeding, and certainly had the implied, if not the positive, sanction of the Court.

The infants appeared by a person undertaking to represent and acting for them, not altogether officiously, but who had not been appointed by the Court for that purpose. He did irregularly what was necessary and proper to be done by a next friend. It must be so taken, because, as we have said, the Court recognized him as serving a proper purpose—that of a next friend—and acted upon the appearance of the infants by him. Otherwise, it would not have granted the prayer of the petition. *White* v. *Albertson, supra.* It was essential that there should be an appearance by a next friend, who ought to have been regularly appointed, but as one appeared in fact, and the Court so treated him, that was sufficient for the purpose of acquiring complete jurisdiction. So far as appears from the record, the infants appeared advisedly in Court in

their own special proceeding and obtained relief for their benefit.

The Court therefore erred in deciding that the proceeding in question, including the orders, judgments and the sale of the land complained of, was void. They were not void, and nothing is alleged or proven, that could warrant the Court in setting them aside. It is not alleged that they were fraudulent or that the infants suffered injury or prejudice by them.

Of course the guardian in South Carolina will not be allowed to remove the fund belonging to the infants until he shall have complied with the requirements of the statute, (*The Code*, §§1598, 1599,) prescribing how a foreign guardian may have his ward's property in this State removed to the State of the latter's domicile.

The defendants are entitled to a new trial. To that end let this opinion be certified to the Superior Court according to law. *It is so ordered.*

Error. Reversed.

FRANK & ADLER v. ROBINSON & HOLT et als.

Fraudulent Conveyances—Injunction—Code Practice.

1. The insertion in a deed of trust of a provision that the trustee shall employ the assignor at a fixed salary to help dispose of the property conveyed, does not render the deed void upon its face, but furnishes evidence of a fraudulent intent, proper to be submitted to the jury.
2. An injunction will be continued to the hearing to retain control of a trust fund, when the rights of the parties are doubtful, and the defendant threatens to remove the fund beyond the jurisdiction of the Court.
3. In such case the Court may allow the defendant to dispose of the property, upon his giving bond to protect the other claimants.

4. While a creditor can issue execution and sell property disposed of in fraud of creditors, this does not prevent a court of equity from restraining the fraudulent donee until the question of fraud can be tried, so that the property can be sold free from any cloud, and under the Code practice, all this may be done in one action.

(*Morris* v. *Willard*, 84 N. C., 203; *Clark* v. *Bonner*, 1 Dev. & Bat. Eq., 608; *Bethel* v. *Wilson*, Ibid., 610; *Bank* v. *Harris*, 84 N. C., 206; *Mebane* v. *Layton*, 86 N. C., 571; cited and approved).

MOTION to continue an injunction to the hearing, made in civil action in the nature of a creditor's bill, pending in the Superior Court of VANCE county, heard by *Connor, Judge*, at Chambers, in Henderson, on March 30, 1886.

The defendants J. I. Robinson and George Holt, as partners of the mercantile firm of Robinson & Holt, becoming largely indebted in carrying on their business, on March 17th, 1886, conveyed by deed "their stock of goods in the store of Mr. Alley, estimated to be of the value of $4,000, more or less, and credits," with a reservation of the constitutional exemption of $500 to each, to the defendant H. T. Watkins, in trust to secure certain preferred and recited debts in the deed mentioned, and contained in schedules A and B, annexed to it.

The trust declared is in these words:

"But on this special trust, nevertheless, to take possession of the same, and after said exemptions shall have been set aside, to take an inventory of said goods, and then to sell the same, with all reasonable dispatch, either privately or publicly, as in the opinion of said trustee may be most advantageous to all parties interested in this trust; also to collect the said debts if possible. The said trustee is to employ the said Robinson and said Holt as salesmen, at the sum of fifty dollars a month, and all other assistance that may be necessary to aid in carrying out this trust; to rent a store room for such time as may be necessary. The trustee is to be paid the proceeds of each day's sales at the close of each day, but he

is to be held personally responsible for only such sum as he shall actually receive."

The deed then directs the funds to be applied to the expenses of administering the trust; a commission of five *per cent.* to the trustee; two small sums, in amount $30.50; then to the debts enumerated in schedules A and B, successively.

The debts set out in schedule A to be first provided for, are in the aggregate $2,734.83, whereof $1,180.17 purports to be due the defendant Isaac Eigenbrun, a resident of Petersburg, in Virginia.

Late at night on March 19th, two days after the execution of the trust deed, the trustee, H. T. Watkins, with his assignees, Robinson and Holt, executed a deed to Eigenbrun for the recited consideration of $2,900, wherein they convey all the goods then in the store to him, except the amount set aside and allowed the debtors for their several personal property exemptions.

The present suit, at the instance of certain unsecured creditors, only one of whose claims was then due, and that by judgment rendered by a justice of the peace, and in behalf of all others, is prosecuted to impeach the deed in trust as fraudulent upon its face and in fact, and to have it declared void, so that the property may be secured and appropriated to the general indebtedness, without regard to priorities.

The complaint, with its accompanying exhibits, was laid before the Judge, after due verification, in support of a rule to be served on defendants, requiring them to appear before him on March 30th, at Henderson, and show cause why the prayer of the plaintiffs for an order restraining the defendants from disposing of any of the property or its proceeds, and the appointment of a receiver to take charge of it, should not be granted.

The order was accordingly made, and pending the proceeding the defendants restrained from removing or in any

manner disposing of the property. The application was heard on the day designated, upon the complaint and answer, then put in by all the defendants, and several other affidavits. The answer is an explicit denial of fraud, and sets out in great detail and particularity the circumstances attending the making of the deed, and the steps taken in its execution, and other facts bearing upon the controversy. The only matters shown in the affidavits, and appropriate to the motion, are:

1. That the sum to be paid the assignors is largely in excess of the amount usually paid in Henderson for the services of experienced clerks and salesmen.

2. That the inventory taken of the goods the next day after the assignment by an agent of the trustee, aided by the assignors, with their original cost, showed them to consist of Winter and Fall goods left over from the past season, of the value of $2,984.58, while their real value did not exceed two thirds of that sum.

3. That defendant Eigenbrun, on the morning of the 20th, placed two agents, Joyner and Davis, in charge of the store, without others, and directed the former to sell the goods according to his judgment to the best advantage, and that for the five days following the sales were only $119.56, none being disposed of below its value.

4. That the trustee, while drawing the deed, said to the assignors that he would want to employ them as salesmen at $50 per month, but they did not insist on this being done, and that in so acting, the trustee regarded that as not an unreasonable compensation for the services of persons so competent to render them.

Upon the hearing, and it appearing that the defendant Eigenbrun, a non-resident, is disposing of the goods with a view to their removal out of the State, it was adjudged: "That the restraining order, as to the over due debt, be continued, and that J. R. Young, Clerk, be and he is hereby

appointed receiver, with power and authority to take into his possession so many of said goods as will in his judgment be sufficient to pay said judgment, ($103.63, with interest from March 19th, 1886, and costs,) and the costs herein, and hold the same subject to the further order of this Court. It is further ordered, that if said defendant Isaac Eigenbrun file with said clerk an undertaking with sufficient security, to be approved by said clerk, in the sum of three hundred dollars, conditioned to pay the plaintiffs Jacob Hecht & Co. such sum as they may recover of him on account of said judgment, if said assignment and bill of sale as set forth in said complaint be adjudged fraudulent and void, that he may proceed to sell and dispose of said goods, and said receiver shall forbear to enter upon the discharge of the duties imposed upon him by this order. That this cause be continued for further orders."

From this judgment, the defendants appealed.

Mr. T. M. Pittman, for the plaintiff.
Mr. E. C. Smith, for the defendants.

SMITH, C. J., (after stating the facts). The provision in the deed which requires the employment of the assignors, debtors, by the trustee, in disposing of the goods, and the payment for the services of each at the rate of $50 per month, while we are not prepared to say it vitiates and avoids the conveyance, is so unusual and so obviously for their benefit, while in detriment to the trust fund, that it furnishes evidence of a fraudulent intent, proper, with other facts attending the transaction, to be submitted to a jury.

As the removal of the goods by the non-resident claimant, unless the Court interposes, might render the effort to secure them fruitless, even in the event of the plaintiffs' successful prosecution of their action, it presents a case of possible irreparable injury, which warrants the judgment. There is not

an absolute interdict put upon the claimant, but he is only required to surrender so much of the property as will meet the judgment, or he is allowed to retain and dispose of all, upon giving an undertaking, properly secured, to pay the judgment, if upon the final hearing the creditor shall be declared to have the preferable right to have his debt satisfied therefrom.

As the fund is under the control of the Court, and the result left in doubt, it will retain it, to await the determination of the controversy, on such terms as will be least onerous to the defendant, and yet sufficient for the plaintiff. The practice in this regard is well settled, and we refer to but a single case, *Morris* v. *Willard*, 84 N. C., 203. We do not pass upon the question of fraud, but leave it to the verdict of a jury upon an issue framed to present it.

The appellants also except to the exercise of the invoked jurisdiction, because the law gives a direct remedy, and the property, upon the allegations in the complaint, can be seized and sold. While it is true that property liable to final process, and fraudulently alienated by the debtor, is exposed to the creditor's direct access in suing out execution, it is equally true that when he has obtained judgment and issued a fruitless execution, he may ask the Court to adjudge the fraud and pronounce the nullity of the assignment, so that a good title may be sold and full value obtained. *Clark* v. *Bonner*, 1 D. & B. Eq., 608; *Bethel* v. *Wilson*, Ibid., 610; and under the present practice all this may be done in one action. *Bank* v. *Harris*, 84 N. C., 206; *Mebane* v. *Layton*, 86 N. C., 571.

There is no error, and this opinion will be certified to the Court below for its further action, according to *The Code*, §962.

The appellants will pay the costs of the appeal.

No error. Affirmed.

JOHN A. MOORE, Guardian, v. S. M. ALEXANDER, and H. A. LITCHFIELD, Executor of JESSE NORMAN.

Guardian—Judgment—Evidence.

Since the Act of 1881, (*The Code*, §1345,) a judgment against a guardian in favor of his ward, is not conclusive and irrebuttable evidence in an action on his bond.

(*McKellar* v. *Powell*, 4 Hawks. 34: *Chairman, &c.*, v. *Clark*, 4 Hawks. 43: *Vanbrook* v. *Barwell*, 4 Dev., 268: *Governor* v. *Carter*, 3 Ired., 338: *Governor* v. *Montford*, 1 Ired., 155: *Brown* v. *Pike*, 74 N. C., 531: *Badger* v. *Daniel*, 79 N. C., 386; cited and approved).

CIVIL ACTION, tried before *Gudger, Judge*, and a jury, at Spring Term, 1886, of WASHINGTON Superior Court.

There was a judgment for the plaintiff, and the defendants appealed.

The facts fully appear in the opinion.

Mr. W. D. Pruden, for the plaintiff.

Mr. W. B. Rodman, Jr., for the defendants.

SMITH, C. J. Under proceedings instituted by the Solicitor in the Superior Court of Washington county, upon the bond executed by the defendant S. M. Alexander, as guardian of one Ephraim Mann, and Jesse Norman, the surety thereon, the estates and effects held in trust were delivered to the clerk of said Court, who was appointed a receiver for that purpose. Among the assets was a note executed by Mary Spruill to said Alexander, as guardian, on January 3d, 1869, for $1,515, transferred to the receiver at its full value. This debt had been secured to the said Alexander by a mortgage of lands lying in Tyrrell county, made to him.

The mortgagee, acting under a power conferred, at the instance of the present plaintiff, advertised the lands for

sale, with a view of foreclosure, when both were restrained by an injunction issued from the Superior Court of Tyrrell, in an action which had been begun by the said Mary Spruill, and in which she alleged credits omitted, and to which she was entitled, largely reducing the demand.

In that suit, and upon issues found by the jury that the note was the individual property of the said Alexander, and constituted no part of the trust estate, and that the debtor was entitled to the sundry credits, which followed the transfer of the note, some as against the said Alexander, and others for moneys paid to the receiver, it was adjudged, with these deductions, that the balance due on the note was $254\frac{53}{100}$, whereof $202\frac{45}{100}$ is principal money, bearing interest from the first day of the term, to-wit: the 12th Monday after the 2d Monday in January, 1876.

The present action was begun on the guardian bond against the parties who executed the same, and the surety having died, W. A. Littlefield, his executor, has come in and been made a party defendant in place of the testator. The object is the recovery of the moneys which have been allowed in reduction of the indebtedness of the said Mary Spruill.

The only issue submitted to the jury was in these terms: "Are the defendants indebted to the plaintiff as alleged in the complaint, and if so, in what amount?" To which the response is: $673\frac{28}{100}$, with interest from April 8th, 1877, till paid. The only exception necessary to be noticed is to the refusal of the Court to permit the executor defendant to prove by said Alexander, that the note secured by the mortgage and paid over, was not subject to any credit, and further, that in the settlement with the receiver, a large number of notes belonging to the trust fund were omitted by mistake, the amount of which was in excess of the plaintiff's demand.

The cases are numerous in which it has been decided that a judgment rendered against a guardian is not, unaided by the statute, admissible as evidence against the surety to his bond. *McKellar* v. *Powell*, 4 Hawks, 34.

The same rulings have been made in regard to the sureties to an administration bond. *Chairman, &c.*, v. *Clark*, 4 Hawks, 43; *Vanbrook* v. *Barwell*, 4 Dev., 268; *Governor* v. *Carter*, 3 Ired., 338; *Governor* v. *Montford*, 1 Ired., 155. So in reference to the liability of his surety to an amercement against the sheriff.

The act of 1844, however, changed the rule of law, and rendered competent against the sureties to official bonds, and those given by executors, administrators and guardians, whatever evidence would be competent against the principals, and this was declared to be conclusive, where the evidence was a judgment against him, in *Brown* v. *Pike*, 74 N. C., 531; and in *Badger* v. *Daniels*, 79 N. C., 386.

The act of 1881 amends the previous enactment by making the evidence "presumptive only" against the sureties. *The Code*, §1345.

As the testator was no party to the suit in which the abatement upon the face value of the note was obtained, the executor had the right to re-open the controversy, and rebut, if he could, the adjudication in the case, by showing that no reduction ought to have been made.

The counsel for the appellee concedes the principle contended for by the appellant, and concurring in it as the result produced by the statute, it must be declared there is error.

The verdict must be set aside, and a *venire de novo* awarded, to which end let this be certified.

Error. Reversed.

*DORA ALLEN v. LON TAYLOR.

Vendor and Vendee—Contract to Sell Land—Action to Recover Land—Notice—Undertaking to Secure Rents and Profits.

1. One let into possession of land under a contract to purchase, is an occupant at the will of the vendor, and he so continues until the purchase money is paid.
2. In such case, the vendor may, after reasonable notice to quit, demand possession, and if the possession is not surrendered, he may bring his action at once.
3. What is reasonable notice to quit will depend on the circumstances of each case.
4. While a Court of Equity will hold a vendor who has received the full price for land as a trustee for the vendee, and compel him to convey the legal title, yet before the purchase money is paid it will not deprive him of any of his rights, legal or equitable, and one of these is the right to hold possession of the land, in the absence of a stipulation to the contrary in the contract.
5. The procedure under *The Code* has not changed the legal or equitable rights of litigants, but only allows them, as they existed under the old system, to be administered in one action.
6. A vendee failing to pay the purchase money has no right to have the land sold as of course, and a Court of Equity will not direct a sale at his instance, unless it appears that the land will sell for a sum sufficient to pay the debt, and that he is unable to pay it without a sale.
7. The vendor of land who has not been paid, has two remedies, one *in personam* against the vendee, the other *in rem* to subject the land, and he may pursue both of these at the same time, and may also maintain an action to recover the possession.
8. Where a vendee is let into possession before the purchase money is paid, and the vendor brings an action to recover the possession, the defendant must file the undertaking to secure rents and damages provided for by *The Code*, §237, before he will be allowed to answer.

(*Carson* v. *Baker*, 4 Dev., 220; *Love* v. *Edmondson*, 1 Ired., 153; *Botner* v. *Chappin*, Phil., 497; *Jones* v. *Boyd*, 80 N. C., 258; *Thompson* v. *Justice*, 88 N. C., 269; *Ellis* v. *Hussey*, 66 N. C., 501; *Green* v. *Wilber*, 72 N. C., 592; *Hemphill* v. *Ross*, 66 N. C., 477; cited and approved).

*DAVIS, J., did not sit on the hearing of this case, having been of counsel.

ALLEN *v.* TAYLOR.

CIVIL ACTION, tried before *Philips, Judge*, at January Term, 1886, of FRANKLIN Superior Court.

The plaintiff alleges, in substance, that she contracted to sell to the defendant the tract of land described in the complaint; that she executed to him her bond for title thereto, conditioned that it should be made when and as soon as he should pay sundry promissory notes, running to maturity at different times, given by him to her for the purchase money thereof; that the defendant failed to pay these notes as they matured, and has only paid a small part of the money due upon them; that the defendant is, and has been, in possession of the land ever since the contract of purchase was made; that he is utterly insolvent; that the plaintiff gave him more than six months' notice to quit the possession thereof, and to surrender the same to her, which he refused to do.

This action is brought to recover such possession.

At the appearance term, the plaintiff filed her complaint, and this being an action to recover the possession of land, insisted that the defendant should not be allowed to answer the same until he should give a proper undertaking as required by the statute, (*The Code*, §237,) in such cases. This he refused to do, contending that the statute does not apply to and embrace cases like this. The Court held otherwise, and the defendant having failed to give the undertaking, it gave judgment for the plaintiff, from which the defendant appealed to this Court.

Mr. C. M. Busbee, for the plaintiff.
Mr. C. M. Cooke, for the defendant.

MERRIMON, J., (after stating the facts). It is well settled, that the purchaser of land, when let into possession under a contract of purchase, is simply an occupant of it at the will of the vendor, and he so continues until the purchase

money shall be paid. The vendor may at any time put an end to such occupancy by demanding possession, after reasonable notice to quit; and if it be not surrendered, then he may at once bring and maintain an action to recover the possession.

The occupancy is by permission, and therefore lawful, and hence the occupant is entitled to reasonable notice to quit. It has been held in one case, that three weeks is sufficient notice. This, however, may depend on the circumstances. *Carson* v. *Baker*, 4 Dev., 220; *Love* v. *Edmondson*, 1 Ired., 153; *Botner* v. *Chappin*, Phil., 497.

The counsel for the appellant contended on the argument before us, that the vendor in such cases, is in equity a trustee, holding the legal title of the land for the vendee, to be made to him when and as soon as the purchase money shall be paid by him, and therefore, inasmuch as the Court may administer the equitable as well as the legal rights of parties in the same action, it ought to treat this and like cases as on a footing different from ordinary actions to recover the possession of land, in which the defendant is required to give an undertaking to secure costs and damages for loss of rents and profits the plaintiff may recover, and administer the equitable rights of the parties.

It is true that a Court of Equity will treat the vendor of land as a trustee in that respect for the vendee, and compel him to convey to the vendee the legal title, when the purchase money shall be paid, but it will do this, subject to the rights, legal and equitable, of the vendor. The land remains his at law, and the Court will not deprive him of, or abridge his legal right and remedy to obtain and have possession of it, and have the rents and profits thereof, until the purchase money shall be paid. In the absence of any agreement to the contrary, the vendee has no right, legal or equitable, to have possession of the land until he shall pay the purchase money.

In the absence of any stipulation, express or implied, to the contrary, the contract of sale implies from its very nature that the vendor retains the legal title—the land—the possession thereof, and the rents and profits of it, if he shall see fit, as his, until he shall be paid for it. If he simply does this, then there is no adverse equity to be administered in favor of the vendee. But if in any way, or from any cause, equities arise in favor of the latter, as if he should become entitled to have the land sold to pay the balance of the purchase money, he must set it up by a proper pleading, just as litigants ordinarily do.

While it is true that the Courts administer the legal and equitable rights of parties in the same action when they are properly presented to the Court, it does not follow that a vendor cannot recover possession of the land from the vendee, who has been allowed to go into possession of it while the contract of purchase is current. Indeed, one of the remedies of the vendor, recognized and upheld, is to turn the vendee out of possession. The only difference between the present and former methods of civil procedure in this State is, that the equitable and legal remedy may now be promptly applied in the same Court and in the same action when need be.

The vendee, failing to pay the purchase money, has not the right to have possession of the land, nor to have it sold, as of course, to pay the debt or a balance of it; nor will a Court of Equity direct a sale of it for such purpose, unless it is made to appear that the land will sell for a sum sufficient to pay the debt. It may be that the land is not worth a sum sufficient to pay the debt, or that the vendee can pay it without such sale, and if so, the Court will not direct a sale at his instance. The vendor has two remedies that he may adopt to collect his debt—one *in personam*, to compel the vendee to pay it—the other *in rem*, to subject the land to its payment, and he may prosecute both these remedies

at the same time; and in the meantime, he is entitled to have possession, and can maintain an action to recover the same under the present method of civil procedure, just as he might have done under that formerly prevailing. We cannot conceive of any just reason why this may not be so, and this Court has repeatedly declared that it may be done. *Jones* v. *Boyd*, 80 N. C., 258; *Thompson* v. *Justice*, 88 N. C., 269.

As between the vendee and vendor, the latter is on the footing of a mortgagee, and a mortgagee may maintain an action, now as formerly, against the mortgagor for the possession of the land mortgaged. *Ellis* v. *Hussey*, 66 N. C., 501; *Green* v. *Wilber*, 72 N. C., 502; *Hemphill* v. *Ross*, 66 N. C., 477.

The plaintiff states such a cause of action as obviously entitles her to the possession of the land described in the complaint, in the absence of an answer and any defence pleaded. She is entitled to the judgment granted by the Court below, as the defendant failed to answer. There is not the slightest reason why he should not be required to give the undertaking before being allowed to answer, as required by the statute, (*The Code*, §237). He comes within its letter and spirit. Such undertaking is intended to secure "such costs and damages as the plaintiff may recover in the action, including damages for the rents and profits." Nothing to the contrary appearing, the plaintiff was entitled to recover costs and damages. The complaint contains unnecessary and redundant matter, but nothing appears that hinders the plaintiff's recovery.

The judgment must be affirmed.

No error. Affirmed.

JOHN W. EVANS v. JOSEPH W. ETHERIDGE.

Attachment—Clerks—Process.

1. The clerk only acts ministerially in issuing the process for attachment.
2. In the absence of statutory regulation, a party is only prohibited from acting in his own case, when he exercises some judicial, as distinguished from a ministerial, office.
3. A clerk of the Superior Court, upon making the necessary affidavit before some person authorized by law, may issue a warrant of attachment in an action in which he is plaintiff.
4. It has been the practice in this State for clerks to issue process either for or against themselves.

(*Jackson* v. *Brookhaven*, 89 N. C., 74 cited and approved).

MOTION to dismiss an attachment, heard before *Shipp, Judge*, at Fall Term, 1886, of DARE Superior Court.

The following is so much of the case stated on appeal as it is necessary to set forth here:

"The plaintiff, who was the clerk of the Superior Court of Dare county, issued a summons in his own behalf against the defendant. Afterwards, he made an affidavit before the clerk of the Superior Court of Pasquotank county for an attachment against the property of the defendant, and gave a bond He then issued a warrant of attachment to the sheriff of Dare county, commanding him to attach the property of the defendant in Dare county, to answer the judgment in the action. There was no evidence that the bond was approved or passed upon by the clerk of Pasquotank Superior Court. There was no order from any Judge directing the case to be transferred to the clerk of the Superior Court of any other county, nor application made to any Judge for such transfer. Upon this attachment, granted by the plaintiff, as clerk of the Superior Court of Dare county, the sheriff attached the property of the defendant and holds it.

The defendant moved to dismiss the attachment, upon the ground that the attachment was issued by the clerk in his

own behalf and was void, because the proceedings before the clerk of the Superior Court of Pasquotank were without authority, and were void, and that upon the whole record the proceeding was irregular.

The Court, upon the whole record of the proceedings, gave judgment that the attachment be dismissed at the cost of the plaintiff, from which ruling the plaintiff appeals to the Supreme Court."

Mr. C. W. Grandy, for the plaintiff.
Mr. R. H. Battle, for the defendant.

MERRIMON, J., (after stating the facts). It was held in *Jackson* v. *Brookhaven*, 89 N. C., 74; that the clerk of the Superior Court in making the order of seizure of property in the provisional remedy of Claim and Delivery, only does a *ministerial*, and not a *judicial* act or service, and therefore a deputy clerk might make such order. In such case the statute (*The Code*, §322,) requires that an affidavit shall be made before the clerk, embodying the facts necessary to entitle the party applying for it to the order, and §323 prescribes, that "the clerk of the Court shall, thereupon, by an endorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff," &c.

In the provisional remedy of Attachment, the clerk does in all substantial respects a similar ministerial service.

The statute (*The Code*, §349,) prescribes that the facts necessary to entitle the party applying for the warrant, must appear by affidavit to the satisfaction of the Court granting it, and §351 provides that the warrant may then "be obtained from the Judge of the district embracing the county in which the action has been instituted, or from the clerk of the Superior Court from which the summons in the action issued."

The acts thus required to be done, or that may thus be done by the clerk of the Court, are not such as settle, determine and adjudge the rights of the parties litigant. Their purpose is to grant—supply—litigants with the prescribed process of the law allowed in the beginning, and in the course of the action to its end. The clerk in such matters does what is prescribed to be done—what the law commands him to do—and in the way and case prescribed. If he exercises discretion and judgment, this is done only to the extent—the limited extent—of inquiry, to learn when the process shall go out, and such discretion is always subject to the supervision, control and judgment of the Court.

This being true, in the absence of statutory provision to the contrary, we can see no legal reason why the clerk may not issue the summons and all other process in an action in his own behalf, when he acts only ministerially. It has been the common practice in this State, so far as we know or have information, for the clerk of the Superior Court to issue the necessary process in actions for and against himself. And as the duties of the clerk in issuing warrants of attachment are simply ministerial, and he settles and adjudges no right in such respect, we cannot see why he may not issue such a warrant in his own action. It is competent for him to make proper affidavit before another clerk, or any officer authorized to administer oaths and take affidavits for general purposes.

The law does not forbid the clerk to issue such warrant in his own action, and it is not to be presumed that he is to be denied the ordinary rights of a litigant, simply because he happens to be a clerk of the Court.

There is the less objection to such power of the clerk, as his official acts are constantly under the supervision and control of the Court.

This view is strengthened by the fact, that the statute (*The Code*, §§104, 105, 106,) provides that the clerk shall not

act officially in matters of probate, and the like matters and proceedings, whenever he exercises jurisdictional functions, if he has an interest therein. And so, also, the statute (*The Code*, §§598, 930,) provides that sheriffs and coroners shall not exercise their official authority in cases and matters wherein they are personally interested. It has not, however, been deemed necessary to provide by statute that the clerk shall not issue process in actions in his own behalf, when he does not exercise judicial authority. It is only when one in the exercise of some office exercises judicial authority, that he shall not act—do official acts—in his own case, unless he shall be prevented from doing so by statute.

It may be said that it does not comport very well with a due sense of propriety and delicacy for a clerk to issue process in his own behalf. That may be so, but the law does not provide otherwise, and it fixes the standard of legal propriety. Moreover, in some possible cases, if the clerk could not issue process in his own case, he could not have redress by action at all. The law does not intend that this shall be so. It contemplates that every man shall have the benefit of the principles, and as well the procedure of the law, to enable him to vindicate and establish his rights.

We, therefore, are of opinion that the Court erred in discharging the attachment. Let this opinion be certified to the Superior Court according to law. *It is so ordered.*

Error. Reversed.

J. T. EVANS and wife v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

Injunctions—Finding of fact by the Supreme Court—Nuisance.

1. In applications to continue injunctions to the hearing, the Supreme Court will review the facts and pass upon their sufficiency to warrant the judgment appealed from.

2. Where it appeared by the affidavit of two physicians that a sewer used by the defendant was dangerous to the health of the plaintiffs: *It was held*, no error to continue the injunction against its use to the hearing.
3. In such case, it is immaterial that the sewer is also used by others.

MOTION to continue an injunction to the hearing, in an action pending in HALIFAX Superior Court, heard before *Gudger*, *Judge*, at Chambers, in Jackson, on October 7th, 1886.

The defendant company, in December, 1884, became the owners of a certain lot in the town of Weldon, on which, for years previous, there had been erected a hotel, used and maintained for that purpose, and so kept up by the defendant.

The plaintiff Augusta owns a lot containing three buildings, her dwelling, a butcher shop and a confectionery store, and also a lot known as "Delmonico's," formerly used as a billiard and bar-room, latterly occupied by tenants.

A drain or culvert has been constructed, which receives the filth from the hotel and conveys it under ground some distance, and empties in a ditch on plaintiffs' land, thereby producing, as they allege, offensive and noxious vapors and smells, causing great discomfort to themselves and other occupants, and endangering the health of themselves and families. The suit is to restrain the defendant from maintaining the nuisance, and to recover damages for injury already suffered.

The defendant, in its answer, enters into an explanation of the origin and use of the drain by former proprietors of the hotel, as the natural outlet for the water—of its construction in 1885 of an earth-covered sewer extending to the plaintiffs' lot; of the use of this drain by other intermediate proprietors, and by the plaintiffs themselves as a receptacle for the sewerage from their several lots; and denies the charge that any detriment to their health and comfort has come or will come from the use of the drain by defendant,

requiring any restraint in the use of its property to be put on defendant and not capable of reparation in damages.

The pleadings being in and on oath, the plaintiffs, after notice, applied for a temporary injunction, which, after several postponements by consent, was heard upon numerous affidavits besides the complaint and answer filed by the parties, before *Gudger, Judge*, at Chambers, in Jackson, on October 7th, 1886, when the following judgment was rendered:

"It is adjudged and ordered, that upon the plaintiffs giving the undertaking required in §341 of *The Code*, in the sum of five hundred dollars, the defendant be enjoined and restrained from causing and permitting water and filth to flow and empty on the lands of the plaintiffs described in the complaint, or into the drain or ditch passing through said lands from the hotel owned by said company, situate in Weldon, and which is described in the complaint, and from the privies, kitchen and wash-room of said hotel, till the hearing of this cause."

From this order the defendant appealed to the Supreme Court.

Mr. T. N. Hill, (*Mr. A. J. Burton* also filed a brief), for the plaintiffs.

Messrs. W. H. Day and *R. O. Burton*, for the defendant.

SMITH, C. J., (after stating the facts). While this is a case in which we are required to examine the proofs and pass upon their sufficiency to warrant the interlocutory order of restraint, we do not, after weighing and considering it, deem it necessary to do more than state the convictions produced.

While much of the testimony is variant as to the existing condition of things, and being *ex parte*, renders it difficult to arrive at any satisfactory conclusion as to the facts, it will be noticed that the most material element in the controversy, the effect of the exhalations arising from the offensive admix-

ture which flows by the plaintiffs' lot, upon its sanitary condition, is testified to by two experts—physicians—whose affidavits are expressed in similar terms, and their testimony is produced by the plaintiffs. It is as follows:

"Charles J. Gee, being duly sworn, says: That he is a practicing physician, and is well acquainted with the property of Augusta J. Evans, situated in the town of Weldon, described in the complaint in the cause of Joseph T. Evans and wife Augusta J. Evans against the Wilmington & Weldon Railroad Company, and it is his opinion that the filth, slops and water thrown and emptied, and permitted to flow on the property of the plaintiffs, described in the complaint, by the Wilmington & Weldon Railroad Company, are dangerous to the health of the plaintiffs, and make it uncomfortable and unpleasant to them, the odor arising from the same being offensive and dangerous."

A second affidavit by the same party is as follows:

"Charles J. Gee, being duly sworn, says: That he is a practicing physician residing in the town of Weldon, and is well acquainted with the property of the plaintiffs described in their complaint in the above cause, and that while the health of Weldon for the past three years, away from the ditch through which the slops, filth and water flow from the privies and kitchen of the hotel owned by the defendant, has been good, the health of the locality traversed by said ditch has been more subject to fevers than that portion of said town not so traversed."

Two affidavits of the same import from Dr. A. B. Pierce are filed, and both are residents practicing in the town, while none in opposition are filed by the defendant. With this evidence of impending danger, the fact of which seems to be justified by the experience of the past, we do not see what course could have been pursued, other than to interpose and avert the consequences likely to follow the continuous use of the drain for these impurities cast upon the

plaintiff's lot, at least until the nuisance shall be found to be such upon a final trial.

The fact that others contribute to the mischief, cannot excuse the defendant, while the plaintiffs may have protection also against them. *Sic utere tuo, ut alienum non lædas*, is the maxim to be enforced in the case.

There is no error, and this opinion will be certified to the Court below.

No error. Affirmed.

JOHN F. SOUTHERLAND et al. v. THE BOARD OF ALDERMEN OF THE CITY OF GOLDSBORO, and THE CITY OF GOLDSBORO.

Voters—Constitutional Law.

1. A majority of the qualified voters and not merely of those voting, must vote in favor of the measure in order to allow a municipal corporation to pledge its faith, loan its credit or contract any debt, under the provisions of Art. 7, §7, of the Constitution.
2. To constitute a person a qualified voter within the meaning of the Constitution, his name must be entered on the registration book.

(*Norment* v. *Charlotte*, 85 N. C., 387; cited and approved. *Railroad Co.* v. *Com'rs of Caldwell*, 72 N. C., 486; approved in part and overruled in part).

CIVIL ACTION for an injunction, tried before *Connor, Judge*, at April Term, 1886, of WAYNE Superior Court.

His Honor gave judgment for the defendants, and the plaintiffs appealed.

The facts appear in the opinion.

Mr. W. R. Allen, for the plaintiffs.

Messrs. E. R. Stamps and *C. B. Aycock*, for the defendants.

SMITH, C. J. Under an act of the General Assembly, ratified on the 3d day of March, 1881, the corporate name of the town of Goldsboro was changed into that of the "City of Goldsboro," and provision made for its government by the annual election in the different wards of nine aldermen, and a mayor to be chosen by them, and the appointment of other necessary officers in its administration.

The Private Acts 1881, chapter 50, §29, declares: "that among the powers hereby conferred on the board of aldermen, they may borrow money only by the consent of a majority of the qualified registered voters, which consent shall be obtained by a vote of the citizens of the corporation, after thirty days' public notice, at which time those who consent to the same shall vote "approved," and those who do not consent shall vote "not approved," &c.

The board of aldermen with a view to the establishment of water works, and to provide an adequate supply of water to meet the wants of the city, made an order to take the sense of the citizens upon the question of the issue of city coupon bonds, to the amount of $35,000, bearing six *per cent.* interest, the disposal of which would raise the means of paying for their construction.

Accordingly, an election was held on October 19th, 1885, at which were cast 307 votes, 275 in favor of, and 32 against the proposal.

The registry of voters in the city contained 528 names, and outside of that list there were 45 male persons who had resided in the State more than twelve months, in the city more than ninety days, and in the wards in which they lived, more than thirty days.

It thus appears, that while the approving votes are more than a majority of the voters whose names are registered, if the unregistered voters are added, they will not be a majority of the whole number.

The vote under the charter is sufficient to warrant the issue of the bonds, unless restrained by §7 of Article VII. of the Constitution, which declares that "no county, city, town, or other municipal corporation, shall contract any debt, pledge its faith, or loan its credit; nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

In *C. N. G. R. R. Co.* v. *Commissioners of Caldwell*, 72 N. C., 486, this clause was held, RODMAN, J., delivering the opinion, to require the majority vote to be of all those competent to vote, whether registered or not.

In *Harshman* v. *Bates County*, 92 U. S., 569, decided about the same time, a similar construction was put upon a clause in the Constitution of Missouri, which forbade any county, city or town, "to loan its credit to any company, association or corporation, unless *two thirds of the qualified voters* of such county, city or town, at a regular or special election to be held therein, shall assent thereto," and a statute making two thirds of the qualified voters *voting* sufficient, was declared repugnant to the Constitution and void.

In a subsequent case, *County of Cass* v. *Johnston*, 95 U. S., 360, the ruling was reversed, and the statute held to be declaratory of the true meaning of the Constitution. This contrariety of decisions is noticed and commented on in *Norment* v. *Charlotte*, 85 N. C., 387; and the general ruling, that a majority of the qualified voters, and not of those voting only, must be obtained, left undisturbed.

But who are the qualified voters? In the case just cited, RODMAN, J., says, "a qualified voter is one who is entitled to be registered as a voter, and who is qualified to vote upon registration," without adverting to the omission in the finding of the requirement of naturalization unless the voter be a citizen, so that we can know affirmatively that the unregistered were competent voters under the Constitution, Art. 6, §1.

The next section declares, that no person shall be allowed to vote without registration, or to register without first taking an oath or affirmation to support and maintain the Constitution and laws of the United States and the Constitution and laws of North Carolina not inconsistent therewith. This, then, is an indispensable condition of the right to vote, without compliance with which, the elector, whatever his personal qualifications may be, cannot exercise his franchise.

Nor did the Constitution intend in using the words "qualified voters" to include those who were not registered, and could not vote until they were, as well as those whose qualifications had been passed on, and whose names were on the registry. The inconveniences of a construction which makes it necessary to traverse a county or district in search of outside voters before it can be determined whether a majority of all have voted upon a proposed loan or tax, are very great and manifest, and in closely contested cases would well nigh neutralize the provision. It would require the Court to examine into and decide upon the qualifications, instead of leaving that duty to be performed by those charged with the registration of those alleged to have the right to vote. As a prerequisite, there is of necessity a registration, and as this is prescribed as a condition inseparable from the right to vote, in the Constitution itself, is it not a more reasonable interpretation to confine the expression, "qualified voters," to those who have been admitted to registration, and had at the election a right then to vote, the registry being *prima facie* evidence of the qualifications of all who are registered? This would remove many of the impediments to a judicial determination of the state of the vote and the result of an election, which must be encountered in the construction which gives the larger import to the clause.

To transfer from those whose office it is to inquire into and ascertain the competency of the electors, and put their names upon the registry, to the Courts, where each person's right to

vote may become the subject of controversy, is to impose an unreasonable amount of labor upon the latter, that could hardly have been in contemplation of the framers of the Constitution, while by frequent revisions of the registry, every essentially useful purpose would be attained. This difficulty may have had its influence in bringing about a change of judicial opinion, which counts none but such as vote, in determining the issue, those not voting being considered as acquiescing in the majority vote.

We are therefore of opinion that the outside unregistered voters ought to be omitted from the count, for the reason that: I. They not being registered are not qualified voters in the meaning of the Constitution, and II. The facts found do not show that they possess the qualifications necessary to registration.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

THE FIRST NATIONAL BANK OF SALISBURY v. P. W. MICHAEL.

Negotiable Instruments—Bonds—Promissory Notes.

1. A written instrument whereby a party promises to pay the party therein named a sum certain at a time specified therein, is a promissory note in this State, although it be under seal.
2. A bond payable to the order of the obligee, which recites the particular consideration for which it was given, as for the purchase money for a tract of land, is a negotiable instrument, and a purchaser for value, before maturity and without notice, takes it discharged of any equities between the original parties to it.
3. To render a note unnegotiable, it must show on its face that the promise to pay is conditional, or renders the amount to be paid uncertain.

4. The defendant executed his bond to the order of the payee, which bond recited that it was given for the purchase money for a tract of land, and the payee endorsed it to the plaintiff before maturity. After the endorsement the obligor paid the amount due to the payee, who misapplied it: and *It was held*, that the bond was a negotiable instrument, and plaintiff being an endorsee without notice and before maturity, was entitled to recover.

5. If, in such case, the bond had not been endorsed by the payee, and had been paid and discharged by the obligor before its delivery to the plaintiff, he could not have recovered.

(*Goodloe* v. *Taylor*, 3 Hawks, 458: *Elliott* v. *Southerman*, 2 Dev. & Bat., 358; *Blackmer* v. *Phillips*, 67 N. C., 340: cited and approved. *Miller* v. *Tharel*, 75 N. C., 148; *Howard* v. *Kimball*, 65 N. C., 175: distinguished and approved).

CIVIL ACTION, tried before *Boykin*, *Judge*, and a jury, at November Term, 1886, of ROWAN Superior Court.

The plaintiff alleges in its complaint, that it is the owner of a single bond, duly endorsed by the obligee therein, whereof the following is a copy:

"$750.00. Six months after date, I promise to pay Chas. L. Heitman, or order, seven hundred and fifty dollars, for value received, with interest from date at eight per cent. per annum, payable annually until paid. It being the balance of the purchase money for one hundred and forty-three acres of land on Reedy Creek, in Davidson county, North Carolina, sold this day by Charles L. Heitman to me, and for which I hold a bond for title from said Charles L. Heitman. Witness my hand and seal, this 26th day of October, 1885."

(Signed) P. W. MICHAEL, (Seal.)

Endorsed, CHAS. L. HEITMAN.

It is further alleged, that no part of the money due upon this bond has been paid, and a judgment is demanded for the same.

The following is a copy of the material part of the answer of the defendant:

"VII. For further answer, and as a defence to this action, defendant avers that on the 26th October, 1885, he executed the note referred to and mentioned in the complaint to C. L. Heitman, being the balance of purchase money for a tract of land. That on the 30th day of December, 1885, defendant paid to the said C. L. Heitman the principal and interest specified in said note, and took his receipt for the same on the following day, which receipt defendant will produce on the trial. That upon the payment of the said note, one Alfred Wood, administrator of John Mosely, executed a deed for the land to this defendant. That when the administrator of Mosely sold the land, Heitman became the purchaser, and assigned his bid to defendant, who thereupon executed his note to Heitman, and upon the payment of the note, and at the request of the said Heitman, the said Alfred Wood, administrator as aforesaid, executed the deed for the land to the defendant."

Upon issues submitted to them, the jury found by their verdict, that the bond, a copy of which is set forth above, was deposited by Charles L. Heitman with the plaintiff as collateral security for a debt due from him to the plaintiff—that the defendant had never paid the same to the plaintiff, and that he paid the same to the said Heitman on the 31st day of December, 1885.

The following are the parts of the case settled on appeal, material to be set forth here:

"Plaintiff introduced as a witness, J. H. Foust, cashier of the bank, who testified that on the 28th of October, 1885, one Charles L. Heitman discounted his note for $750.00 with plaintiff, and on the same date endorsed the Michael note to plaintiff as a collateral to secure his note. That the Heitman note was discounted on the strength of the collateral; and said Michael note has been in the constant and

uninterrupted possession of plaintiff from October 25, 1885, until suit was brought thereon. The note executed by Michael was then introduced.

The defendant was next introduced as a witness, who testified that he paid the amount of the note in full to Heitman on the 31st of December, 1885, and took his receipt for the same; that Heitman told him the note had been misplaced. The receipt was as follows: 'Received of Philip W. Michael, full payment of a note for seven hundred and fifty dollars given by him to me on October 25, 1885, to secure the balance of the purchase money for 143 acres of land, known as the Purcell tract, which note is lost or misplaced, and which is to be delivered to said Philip W. Michael when found. This 31st December, 1885.' (Signed by Chas. L. Heitman.)

Plaintiff insisted that the note executed by Michael was a negotiable instrument, and that the bank was a *bona fide* holder for a valuable consideration; that it was acquired in the usual course of business; that no equity existed between the defendant Michael and Heitman until December 31st, 1885, while plaintiff became the owner of, and Heitman parted with his interest in the note on October 28th, 1885. Plaintiff further insisted the answer of defendant admitted that Heitman had conveyed to him the land for which the note was given.

Defendant contended that the note was not a negotiable instrument, and that the plaintiff took the same with notice of defendant's equity, since the note expressed upon its face that it was given for land for which the defendant had a bond for title from Heitman; that sufficient appeared upon the face of the note to put the plaintiff upon inquiry, and that consequently the plaintiff is affected with knowledge of all that the inquiry would have disclosed.

His Honor was of opinion with plaintiff, and gave judgment accordingly, and the defendant appealed."

Mr. W. C. Blackmer filed a brief for the plaintiff.
Mr. D. G. Fowle, for the defendants.

MERRIMON, J., (after stating the facts). The statute (*The Code*, §41,) makes bonds and notes under seal for money, whether made payable to order or not, assignable over in like manner as inland bills of exchange are by the custom of merchants, and the person to whom the same shall be assigned or endorsed, may maintain an action against the maker and endorser upon the same, as in case of inland bills of exchange.

A promissory note in this State is a written engagement under seal or not, wherein the maker stipulates and promises to pay a person therein named, absolutely and unconditionally, a certain sum of money, at a time therein specified.

The bond in question has all these requisites and qualities. In it there is a certain obligor and obligee, and there is an express promise to pay absolutely and unconditionally a certain sum of money at a time therein specified. It was therefore, negotiable. It was endorsed, and the plaintiff became the *bona fide* holder of it before it matured, and before the defendant obligor paid the obligee therein named the money which he intended should discharge it. In this latter respect, this case is essentially different from that of *Miller v. Tharell*, 75 N. C., 148. In that case, the note was paid—discharged—before the payee sold it, and it was not endorsed. The Court intimates strongly that if it had been endorsed, the plaintiff might have recovered, notwithstanding the payment.

The defendant contends that the reference in the body of the bond to the consideration for which it was given, rendered it non-negotiable. We do not think so. This inference does not imply a condition or limitation, affecting the promise to pay the sum of money specified; it simply recites the particular consideration, and is intended to mark the

bond as of a particular transaction between the original parties to it, for their convenience. This view is strengthened by the fact that the bond is expressly in terms made payable to "order," thus indicating the purpose of the parties to make it negotiable. The mere fact that the particular consideration of the note is mentioned in it, and that it possibly might involve or give rise to equities between the parties to it, cannot prevent its negotiability by endorsement. To have this effect, it must appear from the reference to it in the note, that it qualifies the promise to pay the sum of money specified, and renders it conditional, or the amount to be paid uncertain. A different rule would much embarrass business transactions involving negotiable notes and bonds, and tend to impair the freedom and confidence that ought to prevail and be upheld in the course of general business and trade. This view was taken by the Supreme Court of Tennessee in *Ryland* v. *Brown*, 2 Head., 270; which case is in material respects like the present one. See also *Goodloe* v. *Taylor*, 3 Hawks, 458; *Elliott* v. *Southerman*, 2 D. & B., 358; Story on Prom. Notes, §26.

The case of *Howard* v. *Kimball*, 65 N. C., 175; cited for the defendant, is unlike this one. Reference is made in the note in that case, to the "Rocky Swamp tract of land," as the consideration for which it was given, and the Court held that such reference was notice of any equity in favor of the maker, but it did not hold that the note was non-negotiable —indeed, it recognized its negotiability by endorsement. This decision cannot help the defendant. The bond, as we have seen, was negotiable and was endorsed to the plaintiff before it was due. This gave it the legal and equitable title to it, certainly as to the relief now sought by the defendant. *Blackmer* v. *Phillips*, 67 N. C., 340.

The reference to the land as the consideration of the bond could not, in any just and reasonable view, put the plaintiff on notice as to the attempted payment of it by the defendant

to the obligee, in its absence. It was not bound to presume or suppose that the defendant would attempt to thus pay the bond without taking adequate indemnity against it. He was bound to know its negotiable nature, and that it was not due.

It was his own laches thus to attempt to pay the note—not that of the plaintiff. It was the misfortune of the defendant that he dealt with and confided in a man who seems to have been faithless and dishonest.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

J. C. L. HARRIS et al. v. WESLEY NORMAN et al.

Entry and Grant—Entry-Taker.

1. An entry-taker has no authority to act upon the application of a claimant for lands not situated in his county, and an entry of such application on his records would be void.
2. The entry, the copy thereof, the warrant for a survey, the survey and the plats, constitute the essential groundwork of the grant, and in their absence there is no authority to issue the grant.
3. Where all the proceedings preliminary to the issuing of the grant described the land as lying in one county, and the land was described in the grant as lying in that county, but as a matter of fact it was situated in another county, the grant is void.
4. Where the invalidity of a grant appears on its face, it is not necessary to attack it by a direct proceeding, but it may be taken advantage of whenever offered in evidence.
5. The provisions of *The Code*, §2784, only extend to cases where the entry of land lying partly in two counties, which is unknown to the grantee, is made only in one county. In such cases the statute cures the defect.

(*Avery* v. *Strother*, Conf. Rep., 496 (434); *Sewell* v. *Mouney*, 2 Murph., 375; *Lunsford* v. *Bastian*, 1 Dev. Eq., 483; *Maxwell* v. *Morriss*, 3 Ired. Eq., 593; cited and approved).

HARRIS *v.* NORMAN.

CIVIL ACTION, tried before *Montgomery, Judge*, and a jury, at Fall Term, 1886, of MITCHELL Superior Court.

This action is brought to recover possession of certain timber-logs, cut on the land mentioned below. The following is so much of the case settled upon appeal as is necessary to present the questions to be decided by the Court:

"The plaintiffs introduced in evidence a grant from the State to them, of date 1870, of two hundred and seventy acres of land lying in *Watauga county*. The entry of said land was made in *Watauga*, and the grant based upon the entry, granted land *lying in Watauga*. By the plaintiffs it was admitted that the land was situated entirely in the county of *Mitchell*; how near the county line did not appear, and was so situated at the date of the entry and grant aforesaid, but that plaintiffs thought it was in Watauga county. Plaintiffs offered to prove that the line dividing Mitchell and Watauga counties had not been actually surveyed. Objection by defendants; objection sustained, and exception by plaintiffs."

There was evidence that the timber or cherry trees were cut on the land covered by the grant, if there was a grant, and that was the only evidence plaintiffs offered of their title to the trees.

The Court instructed the jury, that the grant to plaintiffs was void, and that the plaintiffs were not entitled to recover. There was a verdict and judgment for the defendants. The plaintiffs having excepted, appealed to this Court.

Mr. Thomas P. Devereux, for the plaintiffs.
Mr. W. H. Malone, for the defendants.

MERRIMON, J., (after stating the facts). The statute (*The Code*, §§2751–2788), prescribes what lands of the State shall be the subject of entry and grant, and, with much particularity and detail, how entries shall be made and grants issued.

An entry-taker for each county is provided for and his duties prescribed. He is required to keep his office at the court-house of the county, and to record entries of claims of lands *within* his county. A surveyor for each county is also provided for. The person claiming land is required to make application in writing to the entry-taker in a way designated, and a copy of the application must be entered in a permanent entry-book. This entry is then to be advertised, and may be contested by any one claiming the land or any part of it. When it is settled, a copy of it with an order of survey must be sent to the county surveyor, and he is required to "lay off and survey" the land, and make "thereof two fair plats, the scale whereof shall be mentioned on such plats, and shall set down in words the beginning, angles, distances, marks and water-courses, and other remarkable places crossed or touched by or near to the lines of such lands, and also the quantity of acres," &c. These plats are required to be transmitted to the Secretary of State, or delivered to the claimant, within one year, together with the warrant or order of survey, "one of which, with the warrant, shall be filed by the Secretary, and another annexed to the grant." * * * "The Secretary, on application of claimants, shall make out grants for all surveys returned to his office, which grants shall be authenticated by the Governor, countersigned by the Secretary, and recorded in his office. The date of the entry shall be inserted in every grant, and no grant shall issue upon any survey unless the same be signed by the surveyor of the county," &c.

These and other like provisions in detail, are intended to establish a system of entries and grants, a leading and essential feature of which is the entry-taker's office, and the office of surveyor in each county and the method of procedure therein, as to the grantable lands of the State in the county. The purpose is to establish intelligent order, certainty and

uniformity in granting lands, and to prevent confusion, frauds upon the State, and injustice to individuals.

An entry-taker has no authority to entertain and act upon the application of a claimant of lands not situate in his county. An entry of the same upon the entry-taker's record would be absolutely void. And a survey and plats thereof made by the county surveyor under a copy of what purported to be such an entry, and an order of survey in that connection, would likewise and for the like reason be void. There is a total absence of authority to make such entries, and besides, it would be subversive of the system mentioned, to tolerate and uphold them.

The entry, the copy thereof, the warrant of survey, the survey and the plats thereof required, filed with the Secretary of State, constitute the essential groundwork of the grant, and are necessary to enable the Governor and Secretary of State to exercise authority to issue it. These things give it life and are essential to its validity—without them it is inoperative and void. In their absence no authority to issue the grant arises. There is no power inherent in the Secretary of State to make out a grant, nor is there such power in the Governor and the Secretary of State to authenticate it when made out. Such authority arises only in the case prescribed by the statute. *Avery* v. *Strother*, Conf. Rep., 496 (434); *Sewell* v. *Mouney*, 2 Murphy, 375; *Lunsford* v. *Bastian*, 1 Dev. Eq., 483; *Maxwell* v. *Morriss*, 3 Ired. Eq., 593. It appears that the supposed entry of the land in question in this action, was made in the county of Watauga, and the survey and other proceedings necessary to the issue of the grant, were had in that county, and the grant describes the land as lying therein. It is admitted, however, that the land is wholly situated in the county of Mitchell, and was at the time of the supposed entry and grant of it. The entry and other proceedings in that connection were therefore void, and as a consequence the grant was void, and the

Court properly so decided. It was not necessary to declare the grant void in an action for that purpose, because its invalidity appeared upon its face, whenever it was presented as evidence of title to land situated in the county of Mitchell. It described the land as lying in the county of Watauga. This also appeared from the date of the entry, which must have appeared in the body of it; from the warrant or order of survey signed by the surveyor; and the plat of it, which must have been attached to it. The statute so expressly requires, the purpose being to show that the essential pre-requisites to the grant existed, to show its integrity and validity, if it possess these qualities, or its invalidity in their absence. So that in its nature it would not pass the title to lands in the county of Mitchell. *Lunsford* v. *Bastian, supra.*

On the argument, the counsel for the appellant suggested that the statute (*The Code*, §2984,) embraces a case like this. We cannot think so. It applies by its terms and its purpose only to cases where the claimant makes an entry of land in one county, near to the county line, and not knowing exactly where the line is, the entry extends to and embraces as part of it, adjoining land situated across the line in an adjoining county. In such case, the section just cited declares, "that all grants issued or entries made for lands situated as aforesaid (as above indicated), when the money has been paid into the State treasury, shall be good and valid against any entries hereafter made or grants issued thereon." In this case, the land does not extend across the county line; it is admitted that it was situated *entirely* in the county of Mitchell, how far from the county line does not appear.

The appellant offered to prove on the trial, that the line dividing the counties of Mitchell and Watauga had not been actually surveyed. Such evidence was wholly immaterial, because wherever the line might be, it was admitted, that the land in question was entirely within the county of

Mitchell. It cannot be error to refuse to admit irrelevant evidence. The judgment must be affirmed.

No error. Affirmed.

ADELINE HODGE v. JOS. POWELL et al.

Dower—Married Woman—Privy Examination—Estopped.

1. A married woman cannot be estopped by anything in the nature of contract, but where it would amount to a fraud to allow her to repudiate her acts, she is estopped.
2. Where a husband and wife joined in a bond to convey a tract of land to the defendant, but the wife was not privily examined, and after the death of the husband she received payment for the land and invested the money in other land: *It was held*, that she was estopped from taking advantage of the want of a privy examination, and therefore was not entitled to dower in the land sold by her husband.
3. *It seems*, that when a *feme covert* has the consideration in her hands for a contract which she disaffirms, on account of her coverture, the disappointed party may recover it, and when she has converted such consideration into other property, he may follow it and subject it to the satisfaction of his demand by a proceeding *in rem*.

(*Burns* v. *McGregor*, 90 N. C., 222: *Towles* v. *Fisher*, 77 N. C., 443: *Boyd* v. *Turpin*, 94 N. C., 137: cited and approved. *Scott* v. *Battle*, 85 N. C., 184; *Clayton* v. *Rose*, 87 N. C., 106: distinguished and approved).

This was a PETITION FOR DOWER, tried before *Avery, Judge*, at Spring Term, 1886, of RUTHERFORD Superior Court, the cause having been transferred to the Civil Issue Docket of the said Court, to be tried in Term time, upon issues of law and fact, raised in the pleadings.

The only controversy in this Court, is in reference to the tract of land claimed by the defendant Twitty, and both the

petitioner and defendant Twitty admit title in Hawkins, prior to September 1st, 1879.

The petitioner alleges:

"1. That she was married to one Crowder Hawkins in the year 1863 and lived and cohabited with him until his death, in 1880.

2. That said Crowder Hawkins, during the coverture of the petitioner, was seized and possessed in fee simple of two tracts of land lying in said county, bounded and described as follows: * * * * * * * *

3. That said Hawkins, during the coverture, as the petitioner is informed and believes, sold and conveyed by deed, about fifty acres of the first above mentioned tract to the defendant Lynch Twitty, without the assent of the petitioner or her joining in said conveyance, and without the petitioner having received any consideration whatever for her dower interest in said fifty acres, and that said Lynch Twitty is now in possession of the same.

6. That said Hawkins owned no other real estate, to plaintiff's knowledge, at time of his death. The petition prays judgment for dower in said land."

The defendant Twitty answers and says:

"1. That it is true plaintiff was married to Crowder Hawkins in 1863.

2. The allegations in second paragraph of complaint are admitted.

3. In answer to allegations in paragraph three of complaint, defendant says that defendant Lynch Twitty purchased the land described in said paragraph from said Hawkins, on September 1st, 1879, and that plaintiff signed the papers, but her privy examination was not taken. That no deed was made, but only a bond for title given to defendant Lynch Twitty, which bond was signed by plaintiff, and notes for the purchase money were given by said defendant to Crowder Hawkins. That some time after this transaction,

Crowder Hawkins and the plaintiff, his wife, separated by mutual consent, and lived apart, and that by mutual agreement between them, the unpaid notes were turned over to plaintiff, and after the death of Crowder Hawkins the defendant paid the notes, amounting to $100 and interest, to the plaintiff, and that plaintiff during her widowhood ratified by her words and acts, the contract of sale which she had previously signed. That all the purchase money has been paid.

6. Defendants do not know nor have they sufficient information on which to ground a belief as to the truth of the allegations in paragraph six of the complaint."

Hawkins intermarried with the plaintiff Adeline in the year 1863, and died in July, 1880, and in August, 1880, the plaintiff married Joseph Hodges.

The defendant offered in evidence a bond for title, executed by Hawkins and wife, Adeline, to the defendant Twitty, but the privy examination of the wife was not taken. The bond for title was for the land in controversy.

The defendant Lynch Twitty, in his own behalf, testified in substance, that he bought the land of Hawkins and took a bond for title; that subsequently Hawkins and his wife separated, and the notes for the purchase money described in the bond for title, were left by Hawkins in the hands of one Mooney for the plaintiff, and after the death of Hawkins, she got possession of them, and the witness paid the first note for $50, with interest, to the plaintiff in gold, after the death of her first husband, and before she married Hodges; that he paid the second note six months later to plaintiff's husband, Hodges under her direction; that he paid the third note in her presence, and with her consent, to the said Hodges. Witness also testified, that he had improved the land and added fifteen or twenty dollars to its value.

John Washborne testified, that he went with the defendant Twitty to the plaintiff to witness the payment of the notes.

The first time she said she expected to claim an interest in the land, and did not want the money. Twitty did not pay it then.

The second time Twitty asked her if it was right to pay it to Joseph Hodges, her husband, who had offered to receive it, and she said, "yes, pay it to him."

A. J. Scoggins testified, that he was summoned to help lay off the plaintiff's year's allowance after the death of Hawkins, and that she claimed the three fifty dollar notes in her own right; * * * claimed that they were given to her when she and Hawkins separated. The notes were not included as a part of her year's allowance.

Joseph Hodges, husband of the plaintiff, testified for her, that the first note was paid by defendant Twitty about the last of November, 1880, to the witness. That he paid the second note to the witness a month later, when plaintiff was not present; that he paid the third note to witness in the presence of his wife; that the defendant was told when he paid the first note, that she would not sign the deed.

On cross-examination he testified, that plaintiff signed the bond for title; that witness did not refuse to take the money; that he took it with his wife's consent, and paid it as a part of the purchase money for the tract of land on which he and his wife now live, and that plaintiff had taken title to said land in her own name, and that he (witness) paid the money received on all three of the notes as purchase money for the same.

The jury upon issues submitted, found: That the defendant paid the note first due to Joseph Hodges, with the consent of his wife, after their marriage; that he paid the second note to Joseph Hodges, with the consent of the plaintiff, after their marriage; that he paid the third note to Joseph Hodges, after the marriage, by plaintiff's direction and in her presence; that the value of the permanent improvements put upon the land by the defendant was $20; that the whole amount of

money paid by the defendant to Joseph Hodges, or his wife, was applied to the payment of the purchase money for a tract of land on which said Hodges and wife now live, and for which said Hodges holds title in himself.

Upon this verdict, the Court refused to give judgment for a writ of dower in favor of the plaintiff, until she shall have repaid the amount paid by the defendant as purchase money, as found by the jury, and so adjudged and decided.

From this the plaintiff appealed.

Mr. John F. Hoke, for the plaintiff.

No counsel for the defendants.

DAVIS, J., (after stating the facts). The law favors dower, and is careful to protect the rights of married women and widows.

We take it to be well settled that a married woman, being under disabilities to contract, cannot be estopped by anything in the nature of a contract, but where she does anything in a matter affecting her rights, upon which a person dealing with her might reasonably rely, and upon which he did rely, she cannot protect herself by the disability of coverture, and claim all the benefits of the transaction, and repudiate all that is against her, while withholding and enjoying the fruits and benefits of her misguiding and repudiated act. It would be to make her coverture a safe retreat and safe protection for fraud.

The plaintiff joined her then husband, Hawkins, in the execution of the bond to the defendant for title to the land, to be made upon the payment of the purchase money, but her privy examination was not taken, and she was not estopped from claiming dower. The defendant executed to the husband notes for the purchase money. These notes were delivered to the wife and claimed by her after the death of the husband as her property. The defendant was not

obliged to pay them unless he could get a good title to the land. He was in possession of the land, and she held the notes. It is manifest from the evidence, that he would not have paid the notes to her, or to any one by her direction or with her consent, if he had supposed that she would thereafter set up any claim to the land, and we are at a loss to see how, consistent with any idea of right, she could have received the money, if, at the same time, she intended to claim the land. It appears that the money was paid by her consent, and some of it by her direction, to Joseph Hodges, her present husband, and the whole of it was invested in the purchase of the home and land on which she and her husband now reside, and the title to which, according to the evidence of the husband, (the only evidence upon that point to be found in the record), is in her, though from the verdict it appears to be in the husband. Can she, while enjoying the benefits of a home, paid for by the money of the defendant, be heard to say, because she was a married woman when she joined her now deceased husband in the obligation to make title: "I will hold my interest in my deceased husband's land, because a beneficent law says I am not bound by any obligation entered into under coverture, and I will enjoy, with my living husband, the home and land purchased with money derived from my repudiated act, because, though not bound myself, the same beneficent law says it was the defendant's folly to deal with me?" This the law will not tolerate. *Burns* v. *McGregor*, 90 N. C., 222, and cases there cited; *Towles* v. *Fisher*, 77 N. C., 443; *Boyd* v. *Turpin*, 94 N. C., 137.

An infant is not bound by his contract, but if he makes a contract and disaffirms it, he cannot retain any property acquired by virtue of the contract, and the same principle applies to a married woman. The counsel for the plaintiff relies on *Scott* v. *Battle*, 85 N. C., 184. That case is unlike this. There the married woman had executed a deed by herself alone, and it was the *folly* of the purchaser to take

such a deed, but in that case, RUFFIN, J., said, "if a *feme covert* should retain and have actually in hand, the money paid her as the consideration for her imperfect and disaffirmed contract, her vendee would be permitted to recover the same at law, or *if she had converted it into other property so as to be traceable*, he might pursue it in its new shape, by a proceeding *in rem, and subject it to the satisfaction of his demand.*"

That is just the case here. The plaintiff has her election. If the obligation is repudiated and disaffirmed, she cannot retain the consideration without compensating the defendant for his damages.

We are also referred by counsel to *Clayton* v. *Rose*, 87 N. C., 106. An examination will show that it is unlike this. In that case the act and the silence of the wife, constituted no estoppel. She was under the presumed marital influence of her husband, and there was no consideration, benefit or advantage accruing from the transaction to her.

The form of the judgment is objected to here. This is not assigned as error in the record, and it does not appear from the record that this objection was made when the judgment was rendered, or that the attention of the Judge was called to it in the Court below.

If the plaintiff shall elect to claim dower, the defendant will have a right to such damages as he may sustain thereby, and the judgment can be modified and such order made in regard to the money, as will secure and protect the rights of the parties.

There is no error. Let this opinion be certified to the end that further action may be had in conformity therewith.

No error. Affirmed.

THE BLACKWELL DURHAM TOBACCO COMPANY v. JOHN H. McELWEE.

Evidence—Statements—Costs.

1. Statements in regard to the rights of a party made in his presence, and not denied or explained by him, are evidence against him, but this evidence should never be received unless it be of declarations of that kind which naturally call for a denial or explanation, and they must be made on an occasion when a denial might properly be expected.

2. Where a witness was examined before a commissioner, in another suit, in which the defendant in the present action was a party and also a witness, and during such examination the witness made statements in the presence of the defendant derogatory to his rights in this action, which were not denied at the time they were made, nor did the defendant contradict them on his examination in that action: *It was held*, that the occasion was one where it would have been improper for the defendant to have contradicted the witness, and that such declarations were not evidence in this action.

3. Where a record contains superfluous matter the appellant will be taxed with the costs occasioned by it, although he succeeds in the appeal.

(*Francis* v. *Edwards*, 77 N. C., 274; *Guy* v. *Manuel*, 89 N. C., 86; *Moffitt* v. *Witherspoon*, 10 Ired., 185; cited and approved).

CIVIL ACTION, tried before *Clark, Judge*, and a jury, at April Term, 1886, of PERSON Superior Court.

This action is prosecuted to establish the plaintiff's exclusive right to a certain trade mark used in designating tobacco manufactured by it for sale, and to recover damages from the defendant for its alleged invasion by him. Several issues arising out of the conflicting pleadings were passed on by the jury, whose verdict in response is:

(1). That the plaintiff is entitled to the sole and exclusive use of the claimed trade mark or device, as against the defendant, and to affix the same to their manufactured goods; and

(2). That this right has been violated by the defendant to its damage unascertained.

Judgment was accordingly rendered, according a perpetual injunction against the defendant's further use of the trade mark or device upon his own goods, and directing a reference to Kerr Craige to ascertain and report the earnings, gains and profits accruing to the defendant from his sales of goods with the said trade mark or device wrongfully affixed thereon. From this judgment, the defendant appeals.

Messrs. W. W. Fuller and *John W. Graham*, (*Messrs. Thos. C. Fuller, Geo. H. Snow, Thos. Ruffin* and *A. W. Graham*, were with them on the brief,) for the plaintiff.

Mr. John Devereux, Jr., (*Mr. Jos. B. Batchelor* was with him,) for the defendant.

SMITH, C. J., (after stating the facts). The only exception we propose to consider, since this is decisive of the appeal, is the admission of certain testimony, against the defendant's objection, assigned as error, and embraced in his third exception. This exception is thus set out, with the matter to which it applies, in the record:

"When defendant was on the stand as a witness in his own behalf, plaintiff's counsel showed him a letter signed by Thomas A. Burke, and addressed to Norwood & Webb, attorneys for the executor of John R. Green, and asked him (defendant) if at the time said letter bore date, said Burke was not his partner for the manufacture of tobacco. Defendant said he was not, but had been two years before that time. Defendant then answered to questions of plaintiff's counsel, that he had heard said Burke examined in a former suit concerning the rights of plaintiff, assignor, and defendant, to the trade mark now at issue, before a commissioner to take depositions, and that on said examination Burke admitted the statement of said letter to be substantially true;

that he (defendant) was present when Burke made this statement, and was himself afterwards examined as a witness in his own behalf in the same case, and did not refer to or contradict this letter or statement of Burke. Plaintiff contended that the evidence was competent, on the ground that it called for a reply on the part of defendant, and he made none when he had opportunity to do so. Defendant objected to the introduction of the letter of Burke, but his Honor admitted it on the ground stated by the plaintiff, and defendant excepted."

The letter referred to is quite long, and purports to have been written at Statesville, in December, 1869. It acknowledges a letter enclosing an account against McElwee & Burke, and admits it to be correct as far as it goes. It also states, that "about the last of November, 1868, myself and McElwee agreed to go into the manufacture of smoking tobacco," and recounts their visit to the late J. R. Green to seek information about the proposed business. After speaking of transactions with him, of which he complains, near the close of the letter he adds: "This is my own individual business. Mr. McElwee had nothing to do with the tobacco trade between me and Mr. Green. *He was my partner in the manufacture of smoking tobacco*, and I was to give Mr. Green credit for what he furnished me."

This letter was read in evidence and received as a declaration made in the presence and hearing of the defendant, and which, if true, it behooved him to deny and disavow in his own deposition. It goes before the jury as a tacit admission of the partnership, the force of which was to be considered by them. In this aspect, it might have great influence in determining the verdict, and if incompetent for such purpose, its reception is an error entering into the trial and vitiating the result.

Was the defendant, under the circumstances, called on in his own examination, to contradict the statement, and is his

silence evidence of his assent to its correctness? The general rule is well understood and acted on, that statements made in the presence of a party, and allowed to go undenied and unexplained, are in the nature of an admission of their truth, and as such are competent evidence against him; but in the language of DUNCAN, C. J., in *Moore* v. *Smith*, 14 Serg't R., 393, repeated by Mr. Greenleaf in his excellent treatise on the law of evidence, vol. I., §199: "nothing can be more dangerous than this kind of evidence. It should always be received with caution, *and never ought to be received at all*, unless the evidence is of direct declarations of that kind which naturally *calls for contradiction*; some assertion made to the party with respect to his right, which by his silence he acquiesces in."

"The silence of a party," remarks BYNUM, J., in *Francis* v. *Edwards*, 77 N. C., 274, "is not an assent to statements made in his presence, unless the statements are made under such circumstances *as properly call for a response*."

The principle is thus stated with care and accuracy in a late case by Mr. Justice ASHE: "To make the statements of others evidence against one, on the ground of his implied admission of their truth by silent acquiesence, they must be made on an occasion when a reply from him might be properly expected. But when the occasion is such that a person is not called on, or expected to speak, no statement made in his presence can be used against him on the ground of his presumed assent from his silence." *Guy* v. *Manuel*, 89 N. C., 86. He cites also *State* v. *Sugg*, decided at same term, and Tay. Ev., §738.

Is the evidence admitted of what is contained in the deposition of Burke given in another suit, where the testimony of the defendant was also similarly taken, and in reference to his letter, within the restrictions of the rule? Was he called on to contradict the statement, if untrue, under the circumstances, verbally or in his own deposition?

In our opinion, it would have been rude and indecorous in him to do so orally; nor was it to be expected that he should interfere with the course of his examination as a witness, conducted by counsel, for the mere purpose of contradiction. The testimony was taken for use in a case then depending, and its pertinency and materiality were under the control of counsel. It was not required that the witness should use the occasion to correct every erroneous statement made in the deposition of another witness, even to his own prejudice, under the penalty of having the omission construed into an admission of the truth of what was said, and more especially when he is a mere hearer, and no party to the conversation, so to denominate what was then going on.

In *Moffit* v. *Witherspoon*, 10 Ired., 185, NASH, J., declares that, "it would be carrying the doctrine very far, to say that a party to a suit was bound by declarations of counsel made in his argument to the jury, though made in his presence."

Similar enunciations of limitations upon the rule are found in adjudications elsewhere, to a few of which we will refer: In *Havey* v. *Havey*, 9 Mass. 216: a deposition taken and filed by the defendant in a previous action, was produced and offered against him, on the ground that placing it on file amounted to an admission of the facts stated in it. It was rejected by the Court. In *Wilkins* v. *Stidger*, 22 Cal., 232; the Court say: "It is clear that a party to a suit is not bound by, or held to admit as true, every statement made by his witnesses during the trial of a cause, because he does not deny or contradict them at the time. A denial or contradiction under such circumstances would produce great confusion, and cause continual wrangling between the party and the witnesses."

In *Hersey* v. *Barton*, 23 Verm., 685; a deposition was offered containing a conversation between the plaintiff and the witness about the subject matter in controversy between the parties to the present suit, in presence of the defendant.

This was not addressed to the defendant, did not require an answer, and KELLOGG, J., for the Court, thus speaks: "To hold that a person is bound upon all occasions where his adversary in his presence is making statements to others, and not addressed to him, but which are adverse to his interests, to repudiate the same, or that his silence should be taken as an admission of the truth of those statements, would in our judgment be unsound in principle and unwarranted by authority."

But a case still more in point, decided in the same Court, is that of *Brainerd* v. *Buck*, 25 Verm., 579. Proceedings in chancery were depending to foreclose a mortgage, and one defendant was a witness before the master. One Samuel Buck, a defendant in that suit, but not in this, made statements tending to show that the money in question in the present suit, had come into the defendant's hands. The defendant was present and did not deny it. The Court declare, that "the statements being in a judicial proceeding, and not directed to the defendant then present, *could not call for a denial*, and indeed it would have been quite irregular for him, who stood a stranger to those proceedings, to have interfered and denied any statements which may have been made to the master, by either party."

Now it would have been an impertinent interruption for the defendant to deny the statement of the witness Burke while his examination was in progress, and in giving his own testimony, he was of course under the guidance of counsel and the supervision of the commissioner. It was for counsel and not the witness to determine what information was wanted and to elicit it, for him to give such as he possessed and counsel required. It was not a proper occasion for him to interject contradictions not germain to the subject matter about which he was being examined, in order to escape the inference of assent drawn from his mere silence. This, in our opinion, was not demanded under the circumstances, and

the evidence ought not to have been received, and allowed to be used for such purpose against the defendant.

In this ruling there is error, and the defendant is entitled to have the verdict set aside, and a *venire de novo* awarded. To which end let this be certified to the Court below.

The record contains much superfluous matter, that relating to the interlocutory appeal, which must be taxed against the appellant.

Error. Reversed.

HIRAM GREGORY v. A. J. FORBES.

Entry and Grant of Land under Navigable Water—Wharfs—Pleading.

1. The State can only grant land under navigable water for wharf purposes, and county commissioners have no power to confer upon a party a right to build a wharf upon such land for the purpose of a public road.
2. The riparian owner of land has the right, under our entry laws, to enter the water front up to deep water, for the purpose of erecting a wharf, and in such case, the title to the land passes.
3. Where the answer does not put the plaintiff's title in issue, it is useless for him to introduce evidence of it.

CIVIL ACTION, tried before *Shepherd, Judge*, and a jury, at Fall Term, 1885, of CURRITUCK Superior Court.

The complaint alleges that the plaintiff is the owner of a tract of land lying on the waters of North River, in Currituck county, therein described, and that he has taken out a grant of the land adjacent thereto covered by said waters, for the purpose of erecting a wharf connecting with the shore, under the provisions of §2751 of *The Code*. It avers that the defendant has erected and is using a wharf on the

land embraced in the grant, and refuses to surrender the premises to the plaintiff. The action is to remove him from the premises, and to obtain compensation in damages for his occupation.

The defendant admits that he has built the wharf out in the river upon land embraced in the grant, and this was done long before its issue, and with plaintiff's knowledge, and without his objecting thereto, by virtue of a lease from the county commissioners and under their authority, to whom, for the purpose of a public road, the plaintiff, his wife and one Fisher, had before conveyed the land, and that said wharf is used with the said road as a way to the pier near deep water.

The issues prepared for the jury were:

I. Is the plaintiff the owner and entitled to the possession of the lands mentioned in the complaint?

II. What damage has the plaintiff received by reason of the defendant's unlawful possession and retention of the land?

The jury having been empanelled and the evidence all heard, the Court intimated that the plaintiff had not made out a case upon which he could ask for a verdict, and in deference thereto he suffered a nonsuit and appealed.

Messrs. C. W. Grandy and *E. C. Smith*, for the plaintiff.
Messrs. John Gatling and *W. D. Pruden*, for the defendant.

SMITH, C. J., (after stating the facts). The record does not point out specially the defects in the proof upon which the opinion is predicated, so as to limit our inquiries to the supposed insufficiency, and we are required to explore the whole of the voluminous evidence, documentary and oral, which comes up on the appeal, to find wherein the insufficiency consists.

The documentary proofs adduced in support of the plaintiff's title, were as follows:

I. A deed from Solomon Ashbee, administrator of Thomas Griggs, made in pursuance of proceedings to convert land into assets, on November 29th, 1854, to Joseph S. Dey, conveying a tract of 308 acres on the river shore, whereon the intestate had his residence, for the sum of $1,300.

II. A deed for the same land, executed January 1st, 1858, by said Joseph S. Dey to Isaac C. Fisher.

III. A deed, with the record of antecedent proceedings warranting its execution, made June 13th, 1871, by the plaintiff, administrator of William Dowdy, to Wiley Mathias, for $21, with full recitals, and conveying a tract of twenty-five acres, thus described: "Beginning at a stake, running a westerly course to a plum tree, thence down a line of marked trees to a cypress *on North river, thence down the shore of said river* to a stump," &c.

IV. A deed from said Wiley Mathias, executed two days later, to the plaintiff, for the same land.

V. A record of a suit instituted by the heirs at law of Fisher against the plaintiff to recover land, described as adjoining North river on the west in which the jury find it to be "the property of the defendant," and judgment rendered for him declaring him to have "*title paramount to the plaintiffs.*"

VI. A grant from the State of the water-covered land in front of the shore to the plaintiff, on December 21st, 1882. This issued upon a survey made upon an entry, in which, as shown by the plat, the line runs along the shore, and thence out into the river and around to the point of starting. The survey, after giving boundaries and area of 24 acres, annexes the qualifying words, "*for wharf purposes.*"

The plaintiff testifies, that the lands mentioned in the deeds and Court proceedings had been cleared, cultivated and occupied for more than forty years, having been in pos-

session of Thomas Griggs, then of Joseph S. Dey for five years, of Mrs. Dowdy for three years preceding, and for himself for eighteen years past.

The defendant erected the wharf in the water fronting the land in 1880, and had since maintained the possession and use, in common with the use by the public, and in support of his claim exhibited the following:

1. A deed made October 1st, 1881, by the plaintiff, his wife, and one John W. Fisher, to Currituck county, a piece or parcel of land "on North river, for the purpose of a public road, running from the main road to North river, to Hiram Gregory's landing, commencing at the river side, running down a ditch to the head; thence to a pine (marked), to Whitcomb's line, thence down Whitcomb's line to the corner of his fence, *the width of twenty feet*, except at the water, there we give forty feet square, with the timber excepted."

2. A lease executed by three of the county commissioners, by order of the board, on August 1st, 1882, to the defendant, purporting to confer "a privilege and right to build a wharf in front of the public landing on North river, formerly owned by Hiram Gregory, said wharf to be connected by a bridge with the shore, and to be known as Forbes' Wharf, and to be used for his own use and profit for the term of ten years, beginning on August 1st, 1882."

3. Proceedings instituted for, and terminating in, the laying off of a public road over the same ground, from the main road to said Hiram Gregory's landing. This was done in September, 1881. This is the material evidence on which the nonsuit was suffered.

Two questions have been discussed in the argument; 1st, involving the plaintiff's title to the land back from the margin of the river; and 2d, the efficacy of the grant in conveying the land under the entry laws.

I. The production of the successive deeds that form the

chain in the plaintiff's title, was wholly unnecessary, since it is not put in controversy in the answer.

The defendant says he is in possession of the wharf in front of the public road "*leading through the lands of the plaintiff to Jarvisbury Landing,*" and he claims a right to put up and maintain the wharf, under a lease from the commissioners, who obtained their alleged interest in the premises from a deed of the plaintiff. This deed undertakes to convey, not the soil, but a public way over it, leaving the estate for all purposes in the grantors.

II. As the owner of the shore, the plaintiff had a right under the law, to enter the water front up to the deep water, so as not to obstruct navigation, and thus acquire property in the land. The survey, and we assume the entry which it must follow, expressly declares that it is "for wharf purposes," and this is the only use for which the grant could issue. The law declares that an estate or interest passes when the soil is under navigable water, and this is independent of the form of words contained in the grant. It is apparent upon the face of it, that the land is part of the river, and this patent fact determines what right or title is acquired, and for our present purpose, the grant is operative. Inasmuch as the State only can issue a grant for land covered with navigable waters for the purpose of erecting a wharf, and this only to the riparian proprietor, we are unable to see how the right claimed by defendant could be conferred by the county commissioners upon a stranger like the defendant. The establishment of a public road to the water's edge is one thing—the conferring an exclusive right upon a stranger to erect and maintain a wharf or pier in front of the way is quite another.

We have gone into perhaps a needless detail of the evidence, since we cannot tell upon what grounds the Judge arrived at his conclusion against the plaintiff's maintainance of his action.

But the appeal is disposed of when we say the case was a proper one for the jury to pass on, and there is error in the ruling.

There must be a new trial, and it is so ordered. Let this be certified.

Error. Reversed.

A. R. BEAM et al. v. E. B. JENNINGS et al.

Evidence—Secretary of State—Certificate to a Grant—Practice on Appeal.

1. The clerk of the Secretary of State has no power to certify to and affix the great seal of the State to copies of grants and other papers from the Secretary of State's office, to be used in evidence. The statute contemplates that this officer should do all official acts himself and does not permit any of them to be done by a deputy.
2. Where an action was brought for a tract of land describing it as a whole, and incompetent evidence was admitted which related only to a part, the judgment of the Supreme Court will be for a *venire de novo* generally, and it will not grant a new trial only as to that portion of the land affected by the incompetent evidence.

CIVIL ACTION for the recovery of land, tried before *Avery, Judge,* and a jury, at Spring Term, 1886, of CLEVELAND Superior Court.

There was a verdict and judgment for the plaintiffs, and the defendants appealed.

The facts appear in the opinion.

Mr. John F. Hoke, for the plaintiffs.

Mr. W. P. Bynum, for the defendants.

MERRIMON, J. This action was brought to recover the possession of the land specified and described in the complaint.

On the trial, the Court allowed the appellees—the appellants objecting—to put in evidence what purported to be a "certified copy of a grant from the office of the Secretary of State," to which was attached the Great Seal of the State, and the following is a copy of the certificate appended thereto:

"STATE OF NORTH CAROLINA,
Office of Secretary of State,
RALEIGH, 31st October, 1881.

"I certify the above to be a true copy from the records on file in this office.

(Signed) W. L. SAUNDERS.
Per W. P. BATCHELOR, *Clerk.*"

The appellant contended that the clerk of the Secretary had no authority to make such certificate. The Court held that he had, and this ruling is assigned as error.

We think the Court should have sustained the objection to the certificate.

The Secretary of State is a high and respectable executive officer of State, charged with a variety of important—many of them delicate—duties, that require his personal attention, supervision and scrutiny. His office is created by the Constitution, and his duties are prescribed by statute.

It seems to be the purpose of the Legislature that he shall personally and alone exercise official authority in the exercise of the functions of his office. There is no statutory provision that he shall have an assistant, deputy, or clerk, so designated, required to take an oath of office, and exercise any official authority. He is simply allowed two thousand dollars *per annum*, "for clerical assistance * * * in the discharge of the duties of his office." This does not imply *official* assistance—that the Secretary shall appoint a deputy, or a clerk, one or more, who are to take an oath of office, and hold office for a definite period of time. Plainly he may

employ such "clerical assistance" as he may need, from time to time, sometimes more, at others less, as occasion and his convenience may require, and such assistance he can change or dispense with at his convenience and pleasure, having in view the public need.

By "clerical assistance" is meant, not official assistance, but such as aid in the exercise of official authority by the Secretary himself, such as writing letters, making entries of record, copying grants and the like service. The word "clerical" as employed in the statute, to designate a kind of help, has no very definite meaning; is not a very apt word for the purpose intended, but it is obvious the Legislature did not intend to extend its meaning so as to imply official aid; if so, it would have designated the person to render such aid, as deputy, assistant, clerk, or by some such designation, with a term of office, and required the incumbent to take an oath of office. Nor did it intend that any person whom the Secretary might employ to render such assistance, should have authority to use the seal of the department of State, and certify copies of records, grants, and other important documents and papers deposited and kept in the Secretary's office, under his name, written by such person, or otherwise. It cannot be presumed or inferred that the Legislature contemplated so loose and hazardous a practice. It would practically dispense with official sanction. The law contemplates not simply the application of the seal of office in the authentication of copies of records, grants, and the like, but as well official sanction, manifested by the signature of the proper officer.

This is important and necessary as a guaranty that the seal has been properly applied, and the copy is true as it purports to be. It would certainly be a very latitudinous and unwarranted interpretation of the words, "clerical assistance," to hold that they imply that every person whom the Secretary of State may find it necessary to employ to aid him in the discharge of the "clerical" duties of his office as above indi-

cated, shall take an oath of office and represent him in the exercise of official authority. He might, sometimes no doubt would, require half a dozen or more clerks, copyists and letter writers. Shall they all be sworn as officers? Shall they all represent and act for the Secretary officially in the authentication of copies of records, grants and other papers? If not, which of them shall be sworn? Which of them shall represent him by virtue of the statute, officially, and as to what matters and things?

We learn from the present intelligent clerk of the Secretary, that he has not taken an oath of office, although he has been there several years, and that it is not the practice to require assistants in the office of the Secretary to take such oaths, and for the reason, no doubt, that he interprets the statute as not requiring them to do so.

The interpretation we have given the statute in respect to its purpose to require the Secretary of State to exercise his official authority only by himself, is strengthened by the fact, that as to some other executive officers of State, subordinate assistant officers are allowed, and their duties and authority prescribed. Thus, the Governor has a private secretary and an executive clerk; the Treasurer has a chief clerk, who is deputy treasurer, and may perform the duties of the Treasurer, except signing checks, and he has other assistants. The Auditor also has one clerk at a stated salary, and is allowed a fund to pay for "clerical assistance," as occasion may require. The purpose to require the Secretary to exercise his official authority in person appears also from the strict provisions of the statute (*The Code*, §3339,) requiring his presence at his office. It provides that, "the Secretary of State attend at his office in the city of Raleigh between the hours of ten o'clock a. m., and three o'clock p. m., on every day in the year, Sundays and legal holidays excepted." Wherefore this unusual and stringent provision? What purpose is it to serve? It seems to us obvious, that

one purpose is, to require this high officer, charged with duties and matters so impo rtant to the State and people, to be always present to exerci se his official authority in person, and not by deputy. As t o him, there is a striking absence of subordinate official aid provided for, and the statutes prescribing his duties and p owers, uniformly require in terms, that he shall act officially himself, and not by another, while other statutory provision s in respect to himself and his office preclude reasonable imp lications and inferences to the contrary.

We are therefore of o pinion, that the Court erred in admitting as evidence on the trial, the copy of the grant in question, and the appellants are entitled to a new trial.

The learned counse for the appellees suggested on the argument, that it suffi ciently appears in the record that one part of the land descr bed in the complaint, is unaffected by the error assigned, a nd as to that part, the judgment ought at all events to be af rmed. The appellants do not consent that this may be don , and moreover, the complaint describes the land as one bo dy. There is but one cause of action alleged, and the jud gment embraces all the land in question. The Court cannot u ndertake thus to divide into sections a single cause of act on, and a judgment upon the same, and affirm one part of it, and reverse the other. To do so would be subversive of t telligent procedure and produce confusion.

The judgment must be reversed, and a new trial granted. To that end, let this opinion be certified to the Superior Court according o law. *It is so ordered.*

Error. Reversed.

H. H. SIMS et al. v. T. B. RAY.

Husband and Wife—Deed.

1. While a wife may execute a power of appointment conferred upon her in favor of her husband, yet she cannot convey her land directly to him, except as allowed by *The Code*, §§1835, 1836.

2. The reason that all transactions of the wife with her husband in regard to her separate property were held void at common law, was, not because there was fraud, but because there might be fraud. This rule is now modified by statute, and the wife may contract with the husband, by complying with the provisions of §§1835, 1836 of *The Code*.

(*Taylor* v. *Eatman*, 92 N. C., 607; *Norfleet* v. *Hawkins*, 93 N. C., 392; *Walton* v. *Parish*, 95 N. C., 259; *Lee* v. *Pearce*, 68 N. C., 76; *McRae* v. *Battle*, 69 N. C., 98; cited and approved).

This was a CIVIL ACTION, tried before *Connor*, *Judge*, upon complaint, answer and demurrer, at October Term, 1886, of the Superior Court of DURHAM county.

The plaintiffs allege that they are heirs at law of Mary Ray, late wife of the defendant Tyrea B. Ray; that Mary Ray died in August, 1884, intestate, and seized and possessed of the land described in the complaint; that she never had issue by the said Tyrea B. Ray, and that the said Tyrea B. Ray is in possession of the said land, and wrongfully withholds possession from the plaintiffs.

The answer of the defendant, so far as is material to this case, denies that Mary Ray died seized and possessed of the land mentioned. On the contrary, that the said Mary Ray, on the 17th day of December, 1881, did by her deed duly executed, which has been admitted to probate and registered, convey the said tract of land to the defendant, her husband, for and during his natural life, a copy of which deed is annexed as a part of the answer. The deed, so far as is material to this action, recites, that "the said Mary Ray, in

consideration of the sum of one dollar, to be paid by the said Tyrea B. Ray, the receipt of which is hereby acknowledged, and also the further consideration of the affection which she bears towards the said Tyrea B. Ray, her said husband, has bargained and sold, and by these presents does bargain, sell and convey, to said Tyrea B. Ray, for and during his natural life, a tract of land, (describing it).

The probate is as follows:

"I, Geo. W. Jones, justice of the peace, do hereby certify that Mary Ray, wife of Tyrea B. Ray, personally appeared before me this day and acknowledged the due execution of the within deed of conveyance; and the said Mary Ray, being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto."

The said deed was duly registered on March 7th, 1882.

To this answer the plaintiffs filed a demurrer, and for cause of demurrer say: "That the deed mentioned in said answer, under which defendant claims, is void at law."

The Court adjudged, "that the deed set up in the defendant's answer is void and inoperative to divest the estate of Mary Ray in the land in controversy, and that the demurrer to the said answer be sustained." From this the defendant appealed, and the only question presented for consideration, is as to the validity of the deed from Mary Ray to the defendant.

Mr. R. C. Strudwick, for the plaintiffs.

Messrs. John W. Graham and *John Devereux, Jr.*, for the defendant.

DAVIS, J., (after stating the facts). The appellant relies on *Taylor* v. *Eatman*, 92 N. C., 607; *Norfleet* v. *Hawkins*, 93 N. C., 392; and *Walton* v. *Parrish*, 95 N. C., 259. In the first of these cases it was held, that a *feme covert* was competent to execute a power, whether collateral, appurtenent or in gross, without the concurrence of her husband, and that she might execute it even in his favor; and the same was held in *Norfleet* v. *Hawkins*, *supra*, in which case it was said: "In the execution of a power, there is no contract between the donee of a power and the appointee, and when the appointment is made, the appointee at once takes the estate from the donee, as if it had been conveyed directly to him." These were executions of powers and not contracts or gifts.

The case of *Walton* v. *Parrish*, *supra*, only affirmed the well settled doctrine, that even before the change in the law in respect to the property of husband and wife, under the Constitution of 1868, and subsequent enactments, a deed from husband to wife would be upheld in equity, if it appeared that she was meritorious, and the property conveyed appeared to be no more than a reasonable provision for her. But we take it as settled, that prior to the act of 1871–'2, incorporated in *The Code*, §§1835, 1836, the wife could not by deed convey to her husband, the doctrine being, as laid down in Malone on Real Property, 600, that "unless the wife convey under power to dispose of the same, her disabilities are a bar, and on her death the land descends to her heirs," and except as authorized by §§1835 and 1836 of *The Code*, this is still the law. Its purpose is to protect the wife from the influence and control which the husband is presumed to have over her by reason of the marital relation.

The subject is elaborately discussed in *Lee* v. *Pearce*, 68 N. C., 96; and in *McRae* v. *Battle*, 69 N. C., 98; and the reason for the doctrine fully stated. It proceeds on the idea, not that there *is fraud*, but that there *may be fraud*, and gives an artificial effect to the relation beyond its natural

tendency to produce belief. This doctrine of the common law has been modified by the statutes referred to, and contracts between husband and wife are valid, if executed in the mode authorized by the statute; but in order to render a deed from the wife to the husband valid, the requirements of the statute must be observed. Section 1835 declares, that no contract between husband and wife "shall be valid to effect or change any part of the real estate of the wife * * * unless such contract shall be in writing, and shall be duly proved as is required for conveyance of land; and upon the examination of the wife, separate and apart from the husband, as is now or may hereafter be required by law in the probate of deed of *femes covert;* and it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not *unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated;* provided, that the same may be impeached for fraud as other judgments may."

It will be seen, from a glance at the deed from Mary Ray to the defendant, that the requirements of the statute have not been observed. There is no finding that the execution of the deed is not unreasonable or injurious to the wife, and no conclusion in relation thereto certified by the officer.

Our conclusion is, that the deed from Mary Ray to the defendant is not valid, and upon the death of the said Mary Ray, the land descended to her heirs.

The judgment of the Superior Court must be affirmed. There is no error.

No error. Affirmed.

L. E. MORRIS et al. v. MARY A. WHITE.

Motion in the Cause—Pending Action—When Decree operates as a Conveyance.

1. Where it is sought to set aside a judgment or decree on the ground of irregularity, a motion in the cause, and not a new action, is the appropriate remedy, although the action may be at an end.
2. Where the action is still pending, any relief against a judgment or decree rendered therein, must be by a motion in the cause, and not be a new action.
3. Where parties are required by a decree to execute a conveyance for certain land upon their coming of age, the action is pending until the conveyance is executed.
4. A decree does not operate as a conveyance, unless it complies with the requirements of the statute (*The Code*, §427), by declaring "that it shall be regarded as a deed of conveyance," &c.

(*Williamson* v. *Hartman*, 92 N. C., 236; *Fowler* v. *Poor*, 93 N. C., 466; *Burgess* v. *Kirby*, 94 N. C., 575: *Syme* v. *Trice*, at this Term; *Long* v. *Jarratt*, 94 N. C., 443; cited and approved).

CIVIL ACTION, tried before *Shipp*, *Judge*, at September Term, 1886, of PASQUOTANK Superior Court.

The following is so much of the case stated on appeal for this Court, as is necessary to a proper understanding of the opinion:

"The object of the action is to set aside, for irregularity, the following decree, rendered at Fall Term, 1871, of said Court, in an action wherein Mary A. White (the present defendant), was plaintiff, and Luzinka E. Morris and Eloise Morris (the present plaintiffs), were defendants.

"Upon application to the Court, William L. Reed, Esq., is appointed guardian *ad litem* and *prochein ami* to the infant defendants, and his answer to the complaint allowed and adopted as the answer of said infant defendants.

"And thereupon, upon the pleadings and testimony in

said action, it is ordered, adjudged and decreed by the Court, that there was a contract of sale and for the conveyance of the land named in the pleadings, from Mordecai Morris to the plaintiff before that day, and that said conveyance was actually executed as early as the 28th day of January, A. D. 1868, conveying the said lands named in the pleadings in fee to the said plaintiff, for the consideration, amongst others, of the sum of twenty-eight hundred dollars, and that said deed is lost. It is ordered, adjudged and decreed that the lands named in the pleadings be and they are hereby declared to be vested in fee in the plaintiff Mary A. White, and that the defendants do make a conveyance of said lands when they come of age to the plaintiff, or to her heirs or assigns. It is ordered and adjudged that this judgment be enrolled and registered in Pasquotank county, and that the costs be paid by the plaintiff."

This decree has been duly enrolled and registered in Pasquotank county. It is admitted that Mary A. White entered into the possession of the land under the decree, and has been in possession thereof ever since and received the rents and profits. It is also admitted that Luzinka Morris and Eloise Morris were of age at the time of the commencement of the present action, but that they have not executed to Mary A. White any conveyance for said land as ordered in the decree.

The cause coming on to be heard upon the pleadings and admissions, the defendant's counsel moved to dismiss the action, for that the proper remedy was by a motion in the original cause.

The Court being of opinion that the former decree has not been carried into effect, and that therefore the cause is still pending, sustained the motion. From this ruling, the plaintiffs appealed.

Mr. E. C. Smith, for the plaintiffs.

Mr. Samuel F. Mordecai, for the defendant.

MERRIMON, J., (after stating the facts). The Court properly held that the plaintiffs' remedy was by motion or other appropriate proceeding in the action in which the decree complained of was granted. They seek to have the decree set aside upon the ground of irregularity in it, and in the proceedings in the action leading to it. It was competent, and the appropriate remedy, to move in the action within a reasonable time after the decree was granted, to set it aside for such cause, and this is so, although the action was ended. *Williamson* v. *Hartman*, 92 N. C., 236; *Fowler* v. *Poor*, 93 N. C., 466; *Burgess* v. *Kirby*, 94 N. C., 475; *Syme* v. *Trice*, decided at this term.

But the plaintiffs might, and indeed ought, to have sought relief for any cause, if need be, in the action referred to, because it is still pending. If the party complaining desires to attack the judgment for fraud or the like, or any cause except irregularity, it is proper to do so by a new and independent action, only when and after the action in which it was given is completely terminated. *Williamson* v. *Hartman*, *supra*; *Fowler* v. *Poor*, *supra*. And, if redress can be had in the action thus pending, the Court will not entertain a new action for the same purpose, but will dismiss it as having been unnecessarily and improvidently brought. The Court will not allow, much less encourage, unnecessary actions. To do so, would lead to confusion, injustice and the increased expenditure of costs and labor. *Long* v. *Jarratt*, 94 N. C., 443.

The present plaintiffs, now of full age, have never executed to the defendant, as required by the decree of which they complain, a proper deed, and the action is therefore still pending for any proper purpose. If it is not on the proper current docket as pending, it may be brought forward upon motion, and the plaintiffs can in it seek and obtain the relief they demand by the present action, if it shall turn out that they are entitled to the same. *Long* v. *Jarratt*, *supra*.

It was suggested on the argument, that the decree mentioned in the pleadings operated and still operates, by virtue of the statute, (*The Code*, §427,) to pass the title to the land embraced by it, to the present defendant, and therefore in effect, the action in which it was granted, was at an end, when this action began. Still, the present plaintiffs ought to execute the deed as required, and they may be compelled to do so, unless they should show sufficient cause why they ought not. But it appears from the face of the decree, that it does not conform to the statute, in that it does not declare that it "shall be regarded as a deed of conveyance," &c. It is essential that it shall so declare, to give it the full effect of a proper conveyance of the land. It seems probable that the Court intended that it should have such effect, but it is not sufficient for that purpose. Such statutory provisions must always be strictly observed as to their essential provision.

There is no error, and the judgment must be affirmed. To that end let this opinion be certified to the Superior Court according to law. *It is so ordered.*

No error. Affirmed.

ANN B. LOFTIN v. JOSEPHINE E. LOFTIN, individually and as Admx. of W. F. LOFTIN.

Evidence—§590—*Judge's Charge*—*Equitable Issues*—*Degree of Proof*—*Lost Deed.*

1. Evidence is only rendered incompetent by §590 of *The Code*, when it relates to a transaction or communication between the witness and a deceased person of the class mentioned in this section, in regard to some title or interest derived from, through, or under such deceased person.

2. In an action to have the holder of the legal title declared a trustee for the plaintiff, she was allowed to testify that her father, then dead, gave her the money to purchase the land in controversy, when none of the parties to the action claimed any interest under the father.

3. Where a party claims under a lost deed, he must show by clear and full evidence, that such a deed once existed, its legal operation, and its loss.

4. Under the present practice, where a party claims under a lost deed, it is not error for the trial Judge to charge the jury, that the lost deed could only be established by clear and satisfactory proof.

(*Deans* v. *Dortch*, 5 Ired. Eq., 331; *Fisher* v. *Carroll*, 6 Ired. Eq., 485; *Plummer* v. *Baskerville*, 1 Ired. Eq., 252; *Ely* v. *Early*, 94 N. C., 1; cited and approved. *Halyburton* v. *Harshaw*, 65 N. C., 88; *Ballard* v. *Ballard*, 75 N. C., 190; distinguished and approved).

This was a CIVIL ACTION, tried before *Shepherd, Judge,* at Fall Term, 1886, of the Superior Court of GREENE county.

The plaintiff alleged that about the year 1854, her father, Wm. Gooding, placed in her hands, with the knowledge and consent of her then husband, Lewis M. Loftin, about $450, in trust, to invest the same in the land mentioned in the complaint; that the purchase of said land was made by her, through her husband, who paid the money, but through ignorance or mistake, took the deed therefor to himself in fee; that her husband acknowledged the mistake, professed his willingness to correct it, and made an attempt to do so in his last illness; that he died intestate in the year 1855, leaving W. F. Loftin, the issue of his marriage with the plaintiff, his heir at law. That about the year 1857, the plaintiff being about to contract a marriage with one B. L. Bryant, entered into a marriage contract, whereby the said land was conveyed to one Wm. H. Washington in fee, in trust for her sole and separate use, and the said marriage contract was duly proved and registered. That afterwards, in the year 1858 or 1859, the said Washington died, and by proper proceedings, instituted in the Court of Equity of Lenoir county, (in which said land was situate,) W. F. Loftin was

duly appointed trustee in the place of the said Washington, and held the said land as trustee till his death. That said Loftin died in the year 1882, leaving a will, by which he devised all of his real estate to his widow, the defendant, who qualified as administratrix with the will annexed of the said Loftin, and immediately took possession of the said land, and has held it ever since, claiming it as her own under the will of the said Loftin. That the said marrige contract and the registry thereof, and the proceedings of the Court of Equity referred to, were destroyed by fire, and she is unable to produce them. She asks that the defendant shall be declared a trustee for her, and that said land be conveyed to her, and for an account of the rents and profits.

The defendant answers, that she has no knowledge or information as to the material allegations of the complaint, but does not admit them, and says upon information and belief, that the land was paid for with the money of Lewis M. Loftin, and that no part of it was paid for with money derived from Wm Gooding, and for a further defence, she says upon information and belief, that upon the death of Lewis M. Loftin, the plaintiff procured the land mentioned, to be allotted to her as her dower in the land of the said Loftin, and insists that she is estopped from setting up a title in fee thereto. She further answers and says, that shortly after the marriage of the plaintiff to B. F. Bryant, that a deed was executed by them, conveying said land to W. F. Loftin, her only surviving son; that her privy examination was duly had, and the deed duly proved and registered, and that the said W. F. Loftin took possession of said land under said deed, and held it as his own up to the time of his death; that the said deed has been lost or destroyed, and the registration thereof was destroyed by the burning of the Register's office. She further relies upon the statute of limitations.

The following issues were submitted to the jury and answered as indicated:

"1. Did William Gooding, after the plaintiff had married Lewis M. Loftin, place in her hands about $450.00 in trust to be invested in the purchase of the land in controversy from one Durant Jackson for her own benefit? Answer: Yes.

2. Did the said Lewis M. Loftin, as agent of the plaintiff, invest said money in the purchase of the lands in controversy? Answer: Yes.

3. Did the said Lewis M. Loftin, through ignorance or mistake, take the title to said lands from said Durant Jackson to himself? Answer: Yes.

4. Did plaintiff and B. L. Bryan, afterwards, and about the year 1857, convey said lands in fee simple to William H. Washington to hold as trustee for plaintiff? Answer: Yes.

5. Did W. F. Loftin afterwards hold said land as trustee by virtue of an order of the Court appointing him trustee in lieu of William H. Washington, then dead? Answer: Yes.

6. Did the plaintiff and her husband, B. L. Bryan, during the year 1860, convey absolutely by deed to W. F. Loftin, all of her right, title and interest in said lands? Answer: No.

7. Was the deed executed by plaintiff and B. L. Bryan registered in the Register's Book of Lenoir county? Answer: No.

8. What is the annual rental value of the land in controversy? Answer: $450.00.

9. Did the plaintiff, after the death of Lewis M. Loftin, have the land in controversy assigned to her as dower? Answer: No.

10. Has the defendant, and those under whom she claimed, been in the adverse possession, under color of title, of said tract of land, for seven years before the commencement of this action? Answer: No.

It was conceded that on the 31st of December, 1833, one Durant Jackson executed a deed in fee to Lewis M. Loftin, conveying to him the land in controversy; that Lewis M. Loftin died in March, 1855, leaving W. F. Loftin his only heir at law; that W. F. Loftin died February 7th, 1882, leaving the defendant, his wife, his sole devisee of all his property, real and personal.

The plaintiff was examined in her own behalf, and for the purpose of establishing the first issue, (in connection with other evidence), proposed to testify that shortly before the purchase of said land, her father gave her $450 or $550, and put it in her lap.

The defendant objected to this, because it was prohibited by §590 of *The Code*.

She was examined by the Court upon this preliminary question, and it failing to appear to the Court that Lewis M. Loftin, or any one else was present when the money was given her, the Court admitted the testimony, and defendant excepted. She testified that shortly before the deed was made—a day or two—her father counted out and placed in her lap $450 or $500.

The Court, after having charged the jury as to the degree of proof required to establish the equitable issues of the plaintiff, charged the jury that as to these issues, the burden of proof was upon the defendant, and the deed being alleged by defendant to have been destroyed, and she attempting to show the existence of such a deed by parol, the existence of the same having been denied by plaintiff, that it was incumbent upon her to clearly satisfy them of the existence of such a deed before they could find the issue in her favor. Defendant excepted to the charge as to the degree of proof required. Verdict for plaintiff. Defendant moved for new trial upon the ground:

1. For admission of improper testimony.
2. Error in charge of the Court.

Motion overruled and defendant excepted. The defendant resisted judgment because the action was barred by the statute of limitations (three year statute), and because it was a stale demand. Judgment for plaintiff. Defendant excepted and appealed.

Mr. E. R. Stamps, for the plaintiff.
Mr. E. C. Smith, for the defendant.

DAVIS, J., (after stating the facts). The exception to the testimony of the plaintiff, upon the ground that it was not admissible under §590 of *The Code*, cannot be sustained. It was no personal transaction or communication between the witness and any deceased person of the class mentioned in this section. She derived no title or interest from, through, or under William Gooding, nor did any party in any way interested in this suit, derive any such title or interest through him. She did not testify to any transaction or communication with Lewis M. Loftin or Durant Jackson. No title is derived through Wm. Gooding, and neither Loftin nor any one else was present when the money was given to her, and it was competent for her to testify that at a particular time she had $450 or $500, and that it was given to her by her father. It was a substantive transaction, with no one now deceased, under whom she, or any of the parties to this action, derived any interest. It was a transaction with Wm. Gooding alone. Loftin was not present, and the case of *Hallyburton* v. *Harshaw*, 65 N. C., 88; and *Ballard* v. *Ballard*, 75 N. C., 190; relied on by counsel for the defendant, are distinguishable from this, in that, in *Hallyburton* v. *Harshaw*, the communication, though not between the witness and Harshaw, the deceased testator, yet it was between Harshaw and Pearson, (both of whom were dead,) about the matter in dispute, and the witness and Harshaw had, by agreement, gone to Pearson to advise with him about it, so

in fact, the witness was the party really interested in the conversation between Harshaw and Pearson, and though the conversation was carried on by Harshaw and Pearson, the witness was present, and in fact a party to it, as it related to advice given by Pearson, upon which they were to act.

In *Ballard* v. *Ballard*, Wooten, a party to the transaction, was called to prove that he saw the attesting witness sign his name as a witness.

The second exception was to the Judge's charge as to the degree of proof required to establish the existence of the deed alleged to have been destroyed. In *Deans* v. *Dortch*, 5 Ired. Eq., 331; which was instituted in the Court of Equity to recover the amount of a lost bond, the Court held, that it was necessary for the plaintiff to show the loss of the bond; that it had been sealed and delivered by the party sought to be charged, and was perfected in all its parts; and that it was the duty of the plaintiff to sustain his allegation by "sufficient testimony." In *Fisher* v. *Carroll*, 6 Ired. Eq., 485; which was also to recover the amount of a lost note, the Court said, that "strict" proof was required. In *Plummer* v. *Baskerville*, 1 Ired. Eq., 252; which was to set up a lost deed, it was held, that the plaintiff must produce "proper and full proof—that he must clearly prove that such a deed once existed; its legal operation, and its loss, before a decree would be made to establish it." In this case, the Court charged the jury, that the plaintiff must "clearly satisfy" them of the existence of the deed, before they could find the sixth issue in her favor.

We think there was no error in the charge of the Judge. In *Ely* v. *Early*, 94 N. C., 1; it is said that the Court would not correct an alleged mistake in a deed, unless it was made to appear "by clear, strong and convincing proof," and by analogy the lost deed should only be established upon clear and satisfactory proof that it once existed and was lost.

There is no error. Judgment affirmed.

No error. Affirmed.

JAMES L. SMITH et al. v. JOHN W. MCGREGOR.

Pleading—Variance—Agent—Evidence—Deposition—Assignment of Error.

1. A counter-claim which only alleges that the plaintiff is indebted to the defendant, without alleging further the nature and kind of such indebtedness, and how it arose, is imperfectly pleaded, and ought to be disregarded, and in such case a bill of particulars affixed to the pleadings as a part of it does not aid it.
2. Where, in such case, the plaintiff does not object to the counter-claim on account of the imperfect pleading, the Supreme Court, on appeal, will consider the issues which were tried on it in the Court below.
3. Where the answer alleged as a counter-claim, that the note sued on was endorsed to the plaintiff after maturity, and that the endorser was indebted to the defendant before the transfer of the note, for money paid by him as his surety, and the evidence offered to support it was a joint and several note, executed by the defendant and another party, who it was alleged was the agent of the endorser of the plaintiff, but nothing in the note offered in evidence showed any agency: *It was held*, a failure of proof, and the Court below properly charged the jury that there was no evidence to support the allegation of the counter-claim.
4. A power of attorney appointing an agent to wind up certain business of the non-resident principal, does not authorize the agent to borrow money on his account.
5. Where evidence only creates a vague impression of a fact, it should not be permitted to go to the jury.
6. Where the Court below excluded a deposition, but the record did not disclose the ground of the objection, but only the fact that the deposition was excluded, this Court will not consider the exception.
7. Where an entire deposition was objected to on the ground that the testimony contained in it was incompetent, but no particular part was pointed out, and no error assigned, the objection is too vague, and will not be considered.

CIVIL ACTION, tried before *MacRae, Judge*, and a jury, at Fall Term, 1885, of ANSON Superior Court.

The plaintiffs brought this action to recover the money due upon the single bond of the defendant, executed by him

to Thomas J. Smith, for $2,301.25, dated April 26th, 1875, to be due one day from the date thereof, and which the latter endorsed to the plaintiffs for value after its maturity.

In his answer to the complaint, the defendant alleged in general terms, that the said Thomas J. Smith was, at the time he so endorsed the said bond and before that time, justly indebted to him in sundry sums of money, greater than the amount due thereon, as stated in the "bill of particulars" annexed to his answer, and he demanded that the several sums mentioned, be set off against the said cause of action of the plaintiffs to the extent of their demands.

Among the items of charge mentioned in the bill of particulars, is the third one, stated thus:

"Nov. 6. Am't paid as surety on note to J. W. Leak, $2,240.00. Int. from 6 March, 1875, to Jan'y 1st, 1877."

On the trial, the defendant put in evidence a power of attorney, of which the following is a copy:

"STATE OF NORTH CAROLINA, }
ANSON COUNTY. }

Know all men by these presents, that I, Thos. J. Smith, of Grimes county, Texas, for divers good and sufficient reasons me thereto moving, have nominated, constituted and appointed, and by these presents do nominate, constitute and appoint, my brother William C. Smith, of the county of Anson and State of North Carolina, my true and lawful agent and attorney in fact, for me and in my name and stead, to transact all matters of business, of whatsoever nature and kind in which I have or may have any interest, directly or indirectly, in the State of North Carolina; also in my name and for my use and benefit, to ask and demand for me and recover, all manner of debts or dues or rights or interest to which I may be or am entitled in said State, clear up and settle in such manner as he may deem best my interest in said State, and to execute all manner of convey-

ances in my name, to make title to any kind of property, real or personal. And to execute all such other rights, releases and acquittance in my name which may be required in final and complete settlement of my business of every kind and description, and I hereby ratify and confirm whatever my said attorney may thus do, in as full and ample a manner as if I was personally present and did the same myself. This power of attorney relates particularly to my business at New Forestville, in said county and State, in all its branches. I further claim the right to revoke this right at any time I see proper. Given under my hand seal, this the 29th day of January, 1869."

The following is a copy of so much and such parts of the case settled on appeal as is necessary to a correct understanding of the opinion of the Court:

"The defendant was examined on the trial as a witness in his own behalf, and the part of his testimony material here, is as follows:

On the third item, a note is produced and offered, $2,240:

Twelve months after date, we, or either of us, promise to pay Col. J. W. Leak, or order, two thousand two hundred and forty dollars, for value received.

WM. C. SMITH, (Seal.)

March 6th, 1874. J. W. MCGREGOR, (Seal.)

INDORSEMENTS:

Cr. by $100, November 5, 1877.
Cr. by $100, November 16, 1877.
Cr. by $200, November 24, 1883. A. B. LEAK.

Witness signed the note with W. C. Smith. W. C. Smith asked witness if witness would sign a note with him for some money; he said he had plenty of notes and accounts

and stock then, if he could realize on it, but it would take some time to do it, and debts were pressing him, debts made in connection with his business there, some northern debts and some in Wilmington; he said there would not be any danger of witness getting into trouble about it; that he had plenty of notes and accounts then, amounting to $6,000 or $7,000, that would amply secure witness against loss. Witness agreed to sign the note, and went to Rockingham with W. C. Smith and signed it there. Witness never heard of it again until 1876, when payment was demanded of him, and he gave a mortgage to the payee, J. W. Leak, to secure the debt, on a piece of land that would pay the debt. A mortgage was produced from J. W. McGregor and wife to J. W. Leak, 24th February, 1876, to secure the $2,240 note. Credits on the note, November 5th, 1877, $100; November 16th, 1877, $100, and March 26th, 1883, $200. Witness paid these amounts. J. W. Leak is dead. The land mortgaged is worth more than the debt.

When the note was signed, W. C. Smith got the money, $1,300 or $1,400, in check on New York, the balance in cash. He said that he was going to pay the debts of the concern; that they were pressing him; it was T. J. Smith's business. He let Cox & Boy have the check. How it was paid out afterwards, witness does not know. Objected to by plaintiffs. Overruled. Plaintiffs excepted. But, on this item, the Court afterwards instructed the jury that there was a variance between the allegation and the proof, and they could not consider the matter of Leak's note. Defendants excepted.

He was out here, I think, in 1875. He told me that as soon as he got to Wadesboro he was sued on accounts that his agent made here, and that he was afraid his agent had involved him here, and that he had fixed his property before he left Texas so that they could not get anything out of him. Objected to by plaintiffs.

As to the fifth item: This a credit of $641 on the account. Some of T. J. Smith's property was turned over to witness to apply to the Leak debt; witness sold it and credited it on the account. The notes and accounts of the concern were put in the hands of witness to secure that Leak debt. T. J. Smith came out here and demanded the property. Witness refused to give them up, and told him if he would pay the debt, witness would give them up. He said he would not do it. He would not allow witness to collect them. Witness had a conversation with W. C. Smith a very short time before the money was borrowed from J. W. Leak in February or March, 1874. The day before it was borrowed he took his books and showed witness the accounts, which, he said, were ample security, and said he was obliged to raise the money.

The witness W. E. Cox testified as follows: We had more or less transactions with W. C. Smith in 1874; received exchange from him and gave him exchange; referring to his books to refresh his memory, witness said the first draft for $800 was signed by me; the next, $50, by my father; and the next, $450, by me March 4th, 1874, all in the firm's name. The three drafts were drawn on ——— & Bennett, New York; during 1874, our firm was doing business with them and shipping cotton for them as commission merchants, and these drafts were drawn about this time. When W. C. Smith got the draft for $800, he had a check for $1,375.66, and wanted drafts for smaller amounts. The witness has a faint recollection that W. C. Smith said he got that check from J. W. Leak, of Rockingham. But don't know whether the draft was there that day; his best impression is that the draft was on J. W. Leak. He has no recollection of seeing his name on it; thinks his father was present, because their rule was to consult about such matters.

The witness, being cross-examined, said that he is a brother-in-law of defendant and son-in-law of W. C. Smith.

Has taken no interest in this matter; was forced to come here by a subpœna against his will.

Deposition of C. P. Mebane was offered and objected to by plaintiff, and ruled out, and the defendant excepted.

J. S. Darlington, a witness for defendant, testified that for a part of the year 1870–'71 he lived at New Forestville, and was superintendent of the works there. They were W. C. Smith's or Thos. J. Smith's; the witness engaged with W. C. Smith for Thomas J. Smith.

The business was all carried on in the name of W. C. Smith, agent. There was a large tannery, saw-mill and grist mill.

The following special instructions asked for by the plaintiff were given:

That there is no evidence that defendant signed the note made payable to John W. Leak and set up, as the surety of Thomas J. Smith. Defendant excepts.

That there is a variance between the allegation in the answer in regard to the set-off of the note of John W. Leak set up in his answer, and the proof, and the jury should not allow the same. Defendant excepts.

The presiding Judge, during the argument to the jury, stated that he would withdraw from the jury the evidence upon the third item of the bill of particulars, that pertaining to the Leak note, as not sustaining the allegations of the counter-claim. Thereupon the defendants asked to be allowed to answer the complaint in accordance with the testimony, and read an affidavit offered for a continuance at a former term, to show that plaintiffs had full notice, and would not be taken by surprise by such amendment.

The Court declined to permit an amendment of the answer at this stage of the trial, and defendant excepted.

The Court instructed the jury upon the third item of the bill of particulars, that there was a variance between the allegation and the proof, and that they could not consider

the said third item of the bill of particulars, the matters of the Leak note, and defendants excepted.

Plaintiffs admit that W. C. Smith was the agent of Thos. J. Smith, and that Thos. J. Smith is bound for all the authorized acts of W. C. Smith."

There was a verdict and judgment for the plaintiffs, and the defendant appealed to this Court.

Messrs. John Devereux, Jr., and *J. D. Pemberton*, for the plaintiffs.

Messrs. J. A. Lockhart, and *P. D. Walker*, for the defendant.

MERRIMON, J., (after stating the facts). The counter-claim is very imperfectly alleged. Indeed, it could not be upheld as a pleading at all, unaided by the bill of particulars appended to the answer. It is stated only in the most general and indefinite terms, that the endorser of the single bond sued upon, is indebted to the defendant, and was, at and before the time of such endorsement, in a sum of money greater than that demanded by the complaint; but what the nature and consideration of such indebtedness was—when, how, and in what amount it arose—is not stated. And treating the bill of particulars annexed thereto as part of the answer, it supplies such essential constutive facts very imperfectly—not in the shape of a pleading, but a scarcely intelligible memorandum.

A counter-claim should be alleged with clearness and precision; its nature, and the consideration supporting it; when, how, and where it arose, should be stated with reasonable certainty. This the statute requires, and moreover, it is necessary to just and intelligent procedure. The counter-claim is substantially the allegation of a cause of action on the part of the defendant against the plaintiff, and it ought to be set forth with the same precision as if alleged in the complaint.

The Court might—ought—to have disregarded the counter-claim so imperfectly alleged as a pleading, or it ought to have required the defendant to set it forth distinctly, and with certainty and precision. But as it did not, and the plaintiff did not object, and the parties were allowed to go to trial without amendment, as suggested, it becomes necessary to ascertain what the defendant alleged in respect to the "third item" of his counter-claim, and what was put in issue by the replication of the plaintiffs in respect thereto.

Treating the bill of particulars as part of the answer, it seems to us that a reasonable interpretation of it implies an allegation on the part of the defendant, that Thomas J. Smith, the endorser of the bond sued upon by the plaintiffs, was indebted to him in the sum of $2,240, with interest from the 6th of March, 1875, to the 1st day of January, 1877, for money which the defendant paid for Smith, at the former date, as his surety, on account of his promissory note, made to J. W. Leak, to which the defendant was surety, and that he was so indebted to the defendant at and before the time he endorsed the bond, then past due, to the plaintiffs.

This is the substance of what is imperfectly alleged. There is nothing in the answer that indicates or hints at, directly or indirectly, the single bond put in evidence on the trial by the defendant, of Wm. C. Smith, and the defendant for $2,240, dated March 6th, 1874, due at twelve months, and made payable to J. W. Leak.

The memorandum of charge is, "Amt. paid as surety *on note* to J. W. Leak."

What note? Whose note? Taking the whole counter-claim into view—its reference and purpose to charge Thomas J. Smith—the manifest inference is, his note was the one referred to.

The plaintiffs broadly denied the counter-claim, and hence it becomes necessary for the defendant to prove on the trial

the substance of his allegations above mentioned, in that respect.

Did he produce pertinent evidence upon which the jury might have found that Thomas J. Smith was indebted to the defendant as alleged? The Court below held that he did not; that there was a substantial variance between the allegations referred to above and the evidence produced by the defendant to prove it, and therefore the jury could not, as to the "third item" of the bill of particulars, find a verdict in favor of the defendant. The defendant insists that this decision of the Court is erroneous.

We have carefully examined all the evidence bearing upon the question thus presented, and are of opinion that there is no error in the ruling of the Court excepted to, of which the defendant can complain. There was not simply a variance, as the Court held, but accepting the evidence as true, the allegation in its whole scope and meaning as to the "third item" of the counter-claim, was not proved; there was a failure of proof within the meaning of the statute, (*The Code*, §271). Obviously, the single bond put in evidence by the defendant was not that of Thomas J. Smith; he did not sign it, nor did it purport to be his, executed by his agent. Nor was there any evidence of any single bond or note signed by him.

The Court therefore properly told the jury, that there was no evidence that he "signed the note made payable to John W. Leak," as alleged. The power of attorney from Thomas J. Smith to Wm. C. Smith, in evidence, empowered the latter to wind up the business of the former in this State—it did not in terms or effect, authorize him to borrow money, nor did the nature of the business with which he was charged as indicated by the power, imply such authority, nor was there any evidence going to show that this agent had any authority to borrow money for, or on account of his principal.

The defendant, testifying in his own behalf, did not say that he had been surety of Thomas J. Smith, to any note of his whatever, and speaking with special reference to the single bond made to John W. Leak, of William C. Smith and himself, he did not say that it was intended to be that of Thomas J. Smith, or for his benefit, or that the money obtained by it paid his debts: the defendant said simply that "W. C. Smith asked witness (himself) if witness would sign a note with him for some money," and suggested notes and accounts that might indemnify him against loss: but he did not say that the money was to be obtained for Thomas J. Smith, or for his benefit, or that it went to pay debts due from him. The most and the strongest of what he said was, "when the note (the bond) was signed, W. C. Smith got the money, $1,300 or $1,400, in checks on New York, the balance in cash; he said that he was going to pay the debts of the concern; that they were pressing him; it was T. J. Smith's business." This was slight evidence, certainly not sufficient to go to the jury to prove that the money obtained from Leak was obtained for Thomas J. Smith, and went to pay his debts, or in aid of his business matters, especially in the absence of evidence of authority in William C. Smith to borrow money for him. The other evidence, as a whole, had a very slight, if any tendency, to prove that the money was so obtained and so used.

Indeed, taking the whole of the evidence together, it did not prove the allegations of the defendant. It could only create a vague impression that they might possibly have some foundation. It could not in any just and reasonable view of it, warrant a verdict in favor of the defendant as to the matter in question. The Court therefore properly instructed the jury in effect, not to allow the item designated as "third item."

The Court excluded the deposition of C. B. Mebane. What the ground of objection was does not appear, and of course the exception goes for naught.

The defendant objected to the deposition of Thomas J. Smith "on the ground that the testimony was incompetent." What part of, or in what respect, it was incompetent, is not in any way specified, and no error is assigned. It is obvious that such vague and imperfect assignment of error cannot be entertained.

We may say, however, that we have examined the deposition, and it seems to us that the evidence was competent, as tending to prove that Thomas J. Smith was not indebted to the defendant on any account, as alleged by him.

The judgment must be affirmed.

No error. Affirmed.

F. B. DANCY. v. M. A. DUNCAN et als.

Judicial Sale—Mortgage—Lis Pendens—Notice—Fraud—Breach of Trust.

1. Where, after a sale of land to make assets, the heir at law mortgages his interest in the land, the mortgage has the effect of putting the mortgagee in the place of the mortgagor, so that he is entitled to what remains after the payment of the debts, to the amount of his mortgage.

2. If property is transferred by the defendant pending a suit involving its title, in which there is afterwards a judgment for the plaintiff, the judgment relates to the beginning of the action, and binds the property in the hands of the purchaser, and when the transaction and suit are in the same county and the record furnishes evidence of the claim, this rule is not affected by the provisions of *The Code*, §229.

3. Where a party unites with a trustee in a breach of trust, or there are circumstances to put him on his guard and awaken suspicion, he will be required to repay to the trust fund any of its assets which he may have received in consequence of the breach of trust.

(*Briley* v. *Cherry*, 2 Dev., 2: *Cates* v. *Whitfield*, 8 Jones, 266: *Badger* v. *Daniel*, 77 N. C., 251: *Rollins* v. *Henry*, 78 N. C., 342: *Todd* v. *Outlaw*, 79 N. C., 235: *Smith* v. *Fortescue*, Busb. Eq., 127: *Exum* v. *Bowden*, 4 Ired. Eq., 281: *Wilson* v. *Doster*, 7 Ired. Eq., 231: *Lemly* v. *Atwood*, 65 N. C., 46: cited and approved).

CIVIL ACTION, tried upon exceptions to the report of a referee, before *Gudger*, *Judge*, at Fall Term, 1886, of EDGECOMBE Superior Court.

James C. Knight died in 1869, seized and possessed of a tract of land in the county of Edgecombe, which in his will is devised to his daughter, M. A. Duncan, for life or widowhood, and of the remainder, one-third to F. C. Pittman, one-third to Alla W. Burnett, her children by a former husband, and the other third in equal parts to R E. Duncan and P. P. Duncan, her children, the offspring of a later marriage, their father being also dead. The last named devisees in common have also since died, one of them in infancy, and their shares have descended to their half-brother and sister as heirs at law. The said F. C. Pittman, who was appointed and qualified as executor under the will, finding the personal estate of the testator insufficient to pay his debts and the charges of administration, instituted proceedings against the devisees to obtain an order and license to sell the said land, which was granted by the proper Court, in November, 1875, and pursuant thereto, the premises were exposed to sale and bid off by W. D. Pittman at the price of $2,500.

In consequence of the inadequacy of the price, the report of the sale was delayed until the purchaser doubled his bid in January, 1881, and then complied with the conditions of sale, paying $1,000 in money, and executing four notes each in the same sum, payable in successive years, for the residue of his increased offer.

The sale on these terms was reported and confirmed in June, 1882, and title directed to be made to the purchaser on payment of the purchase money. Pending the delay,

and to secure a more advantageous disposition of the land, to-wit: in January, 1878, the executor, F. C. Pittman, and the defendants M. A. Duncan and R. E. Duncan, obtained the loan of $1,000 from N. J. Pittman, then the guardian of the plaintiff, F. B. Dancy, to be used, and which was used, by the executor in paying off the liabilities of the estate, for which sum they executed their bond to the said guardian, he knowing the intended disposition of the fund, and to assure the re-payment of the money due on the note, S. E. Pittman, wife of the executor, uniting with him, by deed of mortgage, conveyed their several estates and interests in said land to the said N. J. Pittman, with a power of sale in case of default in making payment. When the plaintiff arrived at full age, the note, with the mortgage security, was transferred to him by his guardian as part of the trust estate in his hands. The entire indebtedness of the testator's estate was satisfied out of the borrowed money, and the only assets remaining consist of two of the $1,000 notes given for the purchase money, one due January 7th, 1884, which the executor in December, 1881, assigned to the defendant F. H. Whitaker, who knew at the time that the executor was applying the fund in payment of his own personal debt; the other, the executor sold and transferred in the same month to Spier Whitaker, who paid him $974 in money therefor.

At the time of thus disposing of the notes the executor was insolvent, and so has since remained. In November, 1883, he was removed from his office, and administration *de bonis non cum testamento annexo* was granted to the plaintiff Thomas H. Battle.

There have been two references ordered, and from the reports, it is found that the defendant Spier Whitaker did not participate in the mal-administration of the executor in purchasing the note assigned to him, and having acquired the same in good faith, is entitled to the amount due thereon, but must surrender the same to the said Battle, to the end

that he may make title to the purchaser on receiving payment, and must account to said Whitaker for the full proceeds thereof.

It is further found that the defendant F. H. Whitaker was a party to the executor's *devastavit* and perversion of the moneys due on the note assigned to him, and that he has no title thereto against the plaintiffs. The Court confirmed the findings of the first referee, except in so much of his conclusions of law as to the plaintiff having a lien or claim on the note held by the said Spier Whitaker.

The second referee, adopting the findings of his predecessor, and of the Judge acting upon his report, announces as his conclusions of law, summarily expressed:

I. The mortgage does not bind the land, but the purchaser takes it free from the incumbrance and by a title paramount.

II. The unpaid residue due on the note in the hands of the plaintiff, Dancy, on October 19, 1886, was $786.18.

III. The said Dancy, his money having been used to pay the indebtedness of the testator's estate, is subrogated to the rights of creditors for the full amount due on his note.

IV. The assignment of the note to F. H. Whitaker did not pass to him the equitable title to the moneys specified therein as against the plaintiff's claims.

By consent, the note assigned to Spier Whitaker is eliminated from the controversy.

The defendant F. H. Whitaker excepts *seriatim*, and in general terms, to each of the referee's conclusions of law as above enumerated.

On the hearing, the following judgment was entered: "This case coming on to be heard upon the report of Frank Nash, Esq., referee, and the report of G. M. T. Fountain, referee, and the order heretofore made in the cause, it is now ordered and adjudged, that the said report be in every respect confirmed, and that the defendant W. D. Pittman pay the defendant Spier Whitaker the full amount due on the

$1,000 note held by him, upon the cancellation and surrender of said note to said W. D. Pittman, and that the $1,000 note lately held by the defendant F. H. Whitaker, and delivered by him into the office of the clerk of this Court, be surrendered by said clerk to the defendant Thos. H. Battle, administrator, &c., of J. C. Knight, and that the defendant W. D. Pittman shall pay said Battle, administrator, the full amount due on said note, and thereupon the said Battle, administrator, shall cancel and surrender said note to said W. D. Pittman, and shall make to said Pittman a fee simple deed to the land described in the complaint.

And it is further ordered and adjudged, that the defendant T. H. Battle, administrator, shall use the amount paid to him as above, in the due administration of the estate of James C. Knight, paying all lawful debts against the same, and settling the same according to law, and paying to plaintiff the full amount due on his note, as found by the report of Fountain, referee, and paying the costs of this action, to be taxed by clerk.

And it is further ordered and adjudged, that as the defendant devisees under the will of J. C. Knight have been settled with in full, except in so far as concerns plaintiff's claim, the defendant F. H. Whitaker shall, next to plaintiff's claim, be considered as the sole distributee of the estate of said Knight, and that whatever balance may be left in the hands of the said Thomas H. Battle, administrator, &c., after carrying the provisions of this decree into effect, and administering said estate according to law, shall be regarded as personalty and shall be paid over to said F. H. Whitaker as said sole distributee."

Messrs. Thos. H. Battle and *R. H. Battle,* for the plaintiff.

Messrs. F. H. Whitaker, Jr., Donnell Gilliam and *John L. Bridgers,* for the defendants.

SMITH, C. J., (after stating the facts). The purchaser at the judicial sale acquired title to the land, and the mortgage by the defendants in the suit, of their shares, only had the effect of putting the mortgagee in the place of the mortgagors, so that he could claim what remained after payment of the testator's debts what the devisees would have been entitled to, if no mortgage had been made. His right was transferred from the thing sold to its substituted proceeds. This was quite distinctly announced in the opinion when, with other features, the case was before us three years since. "And as the assignee of the former class, (next of kin or legatees,) must assert his claim in the distribution of the personal, so must the mortgagee prefer his, when the real estate fund is to be paid over to those of the latter class," (heirs or devisees). "A verdict and judgment in an action of detinue," in the words of HENDERSON, J., are conclusive as to the title between the parties and their privies." * * * "Privies in estate are those who come in under the owner, and the estate stands burthened, in their hands, with those incumbrances created by him before he parted with it. Therefore if a suit was pending against him for the property when he parted with it, in which there was afterwards a judgment, that judgment relates to the commencement of the suit and binds subsequent purchasers." *Briley* v. *Cherry*, 2 Dev., 2; *Cates* v. *Whitfield*, 8 Jones, 266.

No change in the rule is brought about by the statute prescribing how notice of a *lis pendens* shall be given, *The Code*, §229, when the transaction is in one and the same county, as in the present case, and notice is furnished in the record in the pending action. So it is held in *Badger* v. *Daniel*, 77 N. C., 251; *Rollins* v. *Henry*, 78 N. C., 342; *Todd* v. *Outlaw*, 79 N. C., 235.

Besides the constructive notice given by the record of the pending suit, all the parties in interest were fully cognizant of all that was done, and the loan and mortgage were in-

tended to be, and so known to the mortgagee, as well as to the others, in furtherance of the objects of the suit, and to secure a more advantageous sale of the land. The doctrine of subrogation, if applicable, need not be invoked in aid of the plaintiff's equity. As assignee of the estate of the several devisees, the guardian who loaned the money succeeds to all their rights to come in and take what they could respectively have taken had no assignment been made; that is, their shares of the surplus of the proceeds of sale not required in the course of administration, so far as was necessary to discharge the mortgage debt. This is the legal effect of the conveyance, and it is not necessary to resort to a substitution in place of creditors. This is so obviously the position of the plaintiff in the controversy as to need no comments in further elucidation.

The case of *Smith* v. *Fortescue*, Busb. Eq., 127; fully warrants the present proceeding, and is almost a direct decision in favor of the judgment. The conduct of Whitaker in his voluntary participation in the wrongful disposal of the note, and appropriation of it to the executor's own debt, renders him equally liable to be called on to restore the money to those thus defrauded. He will not be permitted thus to use trust funds when he is fully aware of their nature, or there are circumstances to awaken suspicion and put him on inquiry. The authorities upon this point are numerous, and we refer to a few. *Exum* v. *Bowden*, 4 Ired. Eq., 281; *Wilson* v. *Doster*, 7 Ired. Eq., 231; *Lemly* v. *Atwood*, 65 N. C., 46.

We find no error in the record, and the judgment must be affirmed.

No error. Affirmed.

THE STATE NATIONAL BANK et als. v. J. M. HARRIS et als.

Statute of Limitations—Partial Payment.

1. The effect of §172 of *The Code*, is to leave the law as it was prior to the adoption of the Code of Civil Procedure as regards the effect of a partial payment in removing the bar of the statute of limitations.
2. The fact that the maker of a note has a claim against the holder, which the holder endorses as a credit on the note without the assent of the maker, will not be such a partial payment as will rebut the statute of limitations, but an agreement to apply one existing liability to another, is such a partial payment as will stop the operation of the statute, although the endorsement is never actually made on the note.

(*Green* v. *The College*, 83 N. C., 449; *Woodhouse* v. *Simmons*, 73 N. C., 30; *Hewlett* v. *Schenck*, 82 N. C. 234; *Riggs* v. *Roberts*, 85 N. C., 151; cited and approved).

CIVIL ACTION, tried before *Connor*, *Judge*, at April Civil Term, 1886, of WAKE Superior Court.

This action is upon a bond or promissory note under seal, made by the defendant James M. Harris, principal, and the other defendants, his sureties, to John Gatling, one of the plaintiffs, for $400, due December 15, 1881, and deposited at the plaintiff Bank as collateral security for money loaned. The suit was commenced on August 1st, 1885, and the defence mainly relied on and brought up in the appeal, is the bar of the statute of limitations, pleaded by the sureties. To rebut this, the plaintiffs allege a partial payment of $286.02 to have been made by the defendant Bridgers, on or about March 5, 1882, under §172 of *The Code*. The testimony upon this point was as follows: The plaintiff Gatling gave his note for $262.30 for value, to one T. V. Hill, who endorsed it to the defendant Bridgers, by whom it was again endorsed to Norris, Wyatt & Taylor, who brought suit on the note against the maker and endorser Bridgers, and at August Term, 1883,

recovered judgment against the latter alone. Execution issued thereon, and on March 5th, 1884, was satisfied by payment in full by Bridgers. Thereupon, it was agreed between him and Gatling, that the amount so paid should go and be appropriated as a part payment of the note now in suit, and be credited thereon.

This credit was not in fact so entered, though repeatedly demanded, and with assurances that it should be done.

The note sued on, though payable to Gatling personally, was the property of Annie M. Parker, of whom the former was attorney in law and fact until the winter of 1884–'5, but this was not known to the sureties. The said Annie M. and her husband have been allowed to intervene in the action and assert her claim to the security.

The second article of the complaint alleges the payment by Bridgers, on March 5, 1884, of $286.02, and only the residue of the debt is demanded. The answer of Bridgers denies that upon the facts any payment has been made to interrupt the running of the statute, and insists upon its protection. Of the three issues submitted to the jury, two responses, declaring the said Annie M. to be the owner of the note, and the defendants W. S. Harris and Bridgers to be sureties, were by consent, and the remaining one: "Did defendant T. B. Bridgers pay on said bond $286.02, or any other sum, on or about 5th of March, 1884?" was answered in the affirmative. The defendants insisted that there was no evidence to sustain an affirmative finding upon this issue. This instruction was in these words:

"The Court charged the jury, that if they believed it was understood and agreed between Gatling and Bridgers, prior to 15th of December, 1884, that the amount due by Gatling to Bridgers should constitute a payment on the note in suit, they should find the second issue in the affirmative, and they should consider all the facts and circumstances in evidence in coming to a conclusion. That the burden of proof

was on the plaintiffs, and it made no difference that the note was the property of Mrs. Parker, she having by her answer ratified whatever Gatling had done in regard to the note." To this charge the defendants excepted. There was a judgment for the plaintiffs; and the defendants appealed.

Mr. R. H. Battle, for the plaintiffs.
Messrs. Thos. M. Argo and *Sam'l Wilder*, for the defendants.

SMITH, C. J., (after stating the facts). The sole question to be determined, is as to the effect of the agreement that the indebtedness incurred by Gatling to his surety upon the latter's discharge of the execution, should be applied to that in possession of the Bank, and the amount entered thereon as a credit, in removing the statutory defence arising from the lapse of time. Was it equivalent to an actual payment within the meaning of §172 of *The Code*, which leaves in force the previous law as to the effect of a part payment of a debt? *Green* v. *The College*, 83 N. C., 449.

The present controversy assumes a very singular aspect. The creditor is not refusing to give effect to the agreement to consider his debt paid *pro tanto*, but declares that result to have been brought about, as if what is termed an executory, had become an executed contract, accomplished by the entry of the credit. The debtor seeks to repudiate his own action, and deprive himself of what it is admitted he is entitled to. Undoubtedly, if the relations of the parties were reversed, and the statutory obstruction was not in the way of the debt to be reduced, while it did take away from the surety debtor his remedy by action on the promise of his principal, whether implied or express, there would be no hesitancy in treating the case a direct reducing of the plaintiffs' demand, so that no detriment should come to him from delay. Why should the result be different for the benefit of a debtor repudiating his contract and against

the creditor willing and ready to comply with his own? No reason occurs to us for a change in applying the rule in each case. It is not the mere endorsement of a credit upon the note, even when supported by a counter-claim by the holder, which will have the effect of reviving the liability. *Woodhouse* v. *Simmons*, 73 N. C., 30; but an *actual payment* made and received as such, of which the entry is evidence, as the fact may also be otherwise shown.

"A partial payment," to repeat the words used in the opinion in *Howlett* v. *Schenck*, 82 N. C., 234; "though the evidence need not be in writing, being an act, and not a mere declaration, revives the liability, because it is deemed a recognition of it and an assumption anew of the balance." To the same effect in *Riggs* v. *Roberts*, 85 N. C., 151.

This recognition under former adjudications, and by force of the qualifying words of the statute, which requires a new promise or acknowledgment to be in writing, is equally efficacious in preserving or restoring the remedy when lost by lapse of time. Why should not like consequences flow from an agreement to apply one existing debt to another, even in case of a neglect to make the promised entry on the security? Is it not as clear and positive an admission of responsibility for the residue, as if the money due from Gatling had been handed to Bridgers in extinguishment of his claim for money paid as surety, and immediately thereupon it had been handed back to the former in part payment of his bond? Is not the same result reached in either case, and the payment equally effectual?

The proposition in general terms is this: A has a bond against B, and becomes indebted to B in a smaller sum. They meet and agree that the claim of B shall be discharged by appropriating what is due from him to A to what he owes A. It is not a contract for something to be done in the future, but a present self-executing mutual contract, which at once, for all practical legal purposes, as between

them, extinguishes the one and reduces the other debt. It operates, *eo instanti*, and so would the transaction be interpreted, should either undertake to enforce his satisfied demand. Had Bridgers been a principal and not a surety, so that his liability would continue for ten years, while his counter-demand would be obstructed after three years, Gatling would not be allowed to recover his unreduced debt, but would be entitled to what remains only. The transaction between them would only be deemed a partial payment of the larger demand, and if so, why not for the benefit of the other party?

In our opinion, it is a payment, and in the meaning of the statute such a recognition of the debt as removes the bar.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

O. P. WHITE, Admr. v. JNO. R. BEAMAN, Extr.

Evidence—Section 590—Presumption of Payment.

1. Where a note was given to an attorney for collection who agreed to receive one half of the amonnt collected for his services, but he returned the note to the executor of his client without collecting anything; *It was held*, that the attorney had never had any interest or property in the note, and was a competent witness.
2. Evidence that the plaintiff asked payment of a debt from the defendant, and that the defendant acknowledged that he owed something, and gave the plaintiff some property to be applied to the debt, which was entered as a credit on the bond sued on, is some evidence, taken with other circumstances, to rebut the presumption of payment from the lapse of time, although there is no evidence that at the time plaintiff was the owner of the bond sued on.

(*Slocomb* v. *Newby*, 1 Murph., 423; cited and approved).

WHITE *v.* BEAMAN.

CIVIL ACTION, tried on appeal from a justice of the peace, before *Gilmer, Judge*, and a jury, at February Term, 1886, of SAMPSON Superior Court.

This action was brought by the plaintiff as administrator of James White, deceased, to recover the balance alleged to be due upon the single bond set forth below, which he alleges belonged to his intestate at the time of his death.

The following is a copy of so much of the case stated on appeal, as it is necessary to set forth here:

"$209.99. One day after February the 3d, 1852, I promise to pay Malcom Monroe, or order, two hundred and nine dollars and ninety-nine cents, for value received.

DANIEL MELVIN, (Seal)."

On the back of this note were the following entries:

"Received on the within note, two hundred and fifty dollars. By Aaron Simmons for Daniel Melvin.

"This 3d day of February, 1857."

"Received of the within note, five dollars' worth in whiskey, this 11th day of August, 1865."

The defendant relied upon the plea of payment, and contended that such plea was sustained by lapse of time and by evidence of actual payment.

The plaintiff, in order to repel the presumption of payment from lapse of time, replied that the defendant Daniel Melvin had made a payment on this note before the presumption had arisen, and as evidence of such payment offered to read the entry of August 11th, 1865, on the back of the note, and to prove the same was in the handwriting of James White, the plaintiff's intestate.

To this defendant objected, upon the ground that it did not appear by evidence *aliunde* the said entry, that the same was put on the note on the day on which it bears date, and hence

at a time when it was against the interest of the holder of the note to make such entry. The objection was sustained by the Court.

The plaintiff then offered a witness, J. H. Campbell, who testified that he, the witness, heard a conversation in the summer of 1865, he thought in June or July or perhaps August, between the defendant's testator, Daniel Melvin, and the plaintiff's intestate, James White, substantially to the effect that James White said he wanted Melvin to pay him some money. Melvin said he had no money, but would pay in whiskey, and wanted to let White have as much as a barrel of whiskey. White said he could not live on whiskey, but finally agreed to take 1, 2, 3, 4 or 5 gallons. The whiskey was to be put in a large jug or demijohn, and White said I will give you credit on your note. There was no evidence that the note sued on was in the hands of White at that time, but there was evidence tending to show that some time after this, White and Melvin had a settlement of some large amounts of indebtedness between them.

The defendant contended that this evidence was not sufficient to show that the entry was made by White on the day on which it bears date, because there was no evidence that White held the note then, the same being payable to one Monroe, and no evidence that Melvin ever knew that the note was ever in the hands of White until after the death of James White.

The Court overruled the defendant's objection and allowed the testimony of Campbell, and the entry on the back of the note to go to the jury, as evidence tending to show the payment by Melvin. To this the defendant excepted.

The plaintiff then offered one John D. Kerr, who testified that he, the witness, was a practicing attorney in this county, and as such had received the note in question from James White a while before this action commenced, for collection; that he (the witness) was to have half of what he should re-

cover upon it; that he had presented this note to Daniel Melvin who said it had been settled in the big settlement he had with White, and that he must see Wm. Devane, his attorney, about it; that he would leave it to him; that witness had written to the said attorney, and the attorney had written witness that this note was not included in the settlement; that witness had reported this to Daniel Melvin, who still said that the note was included in the settlement, and that he must see James White about it; that sometime thereafter White died, and witness had surrendered the note to his personal representative, and now had no interest in the controversy.

The defendant objected to this testimony as being incompetent under §590 of *The Code*. The objection was overruled and defendants excepted.

His Honor, in commenting to the jury upon the entry on the back of the note, told the jury if they should be satisfied that the entry was put on the note on the day on which the entry bears date, that it would be evidence for their consideration tending to show a payment, and that where a party holds two or more notes against another, that the debtor in making a payment to his creditor, had the right to direct the application of said payment, but in case he did not direct the application, the creditor had the right to make the application to any debt he pleased. But if no application was directed by the debtor or made by the creditor, then the law made the application to the debt of least security.

The defendant did not question the correctness of this principle of law, but contended that as the question before the jury was not one of the right of application, but one of fact as to whether the entry in question was made on the day on which it bears date, this principle of law had no bearing on the question, and hence excepted to the ruling of the Court.

The jury on the trial, found by their verdict, that the single bond sued upon was that of the testator of the defendant, and that the same had not been paid. The Court gave judgment for the plaintiff, and thereupon the defendant appealed to this Court.

Mr. A. W. Haywood, for the plaintiff.
Mr. J. L. Stewart, for the defendant.

MERRIMON, J., (after stating the facts). We think the evidence of the witness Campbell was competent, and while it was not, perhaps, sufficient of itself to rebut the presumption of the payment of the bond, yet it was properly received in connection with other evidence as tending to rebut it. This witness heard the conversation testified to by him about the time of the date of the entry of the credit of the whiskey, and this fact and the entry taken together, make some evidence to go to the jury to be considered in connection with the other evidence before them.

The objection to the competency of the witness Kerr is unfounded. He had no title to or interest in the bond itself; he as counsel for the intestate White, the owner of it, received it for collection, and agreed to receive as compensation for his services, not the bond or one half of it, or an interest in it, but one half of the sum of money he might collect on account of it. He had no property interest in it. *Slocomb* v. *Newby,* 1 Murph., 423.

The exception to the instruction of the Court to the jury cannot be sustained. The Court simply explained the rule of law as to the application of partial payments of debts, where the creditor has two or more distinct debts against the same debtor, to enable the jury to apply intelligently the evidence in respect to the credit in question entered on the bond.

We do not discover any error in the record, and the judgment must be affirmed.

No error. Affirmed.

B. L. DUKE, in behalf of himself, &c., v. PAUL A. BROWN, tax collector, et als.

Constitutional Law—Qualified Voters—Municipal Corporations—Municipal Bonds.

1. Only those persons whose names appear on the registration books are qualified voters, within the meaning of Art. 7, §7, of the Constitution.
2. The registration books are *prima facie* evidence of the number of qualified voters in a town, but they are open for correction on account of deaths, &c., and *perhaps* for intrinsic disqualifications and errors in admitting persons to register.
3. Where there is an inherent constitutional defect in the statute authorizing the issue of municipal bonds, a purchaser of the bonds takes them with notice of their illegal origin, for purchasers must inquire into the authority by which the bonds are issued, and are held to notice of any defect therein.
4. A majority of the qualified voters, and not merely of those voting, is necessary to enable a municipal corporation to loan its credit or contract a debt.

(*Riggsbee* v. *Durham*, 94 N. C., 800; *Puett* v. *The Com'rs*, 94 N. C., 709; *Norment* v. *Charlotte*, 85 N. C., 387; *Southerland* v. *Goldsboro*, at this Term: cited and approved. *R. R. Co.* v. *Com'rs*, 72 N. C., 486; modified.)

MOTION to continue an injunction to the hearing, in a cause pending in the Superior Court of DURHAM county, heard before *Clark, Judge*, at Chambers, in Raleigh, on April 22d, 1886. His Honor refused the motion, and the plaintiff appealed.

The facts appear in the opinion.

Messrs. Jos. B. Batchelor, R. B. Boone and *John Devereux, Jr.*, for the plaintiffs.

Messrs. Wm. W. Fuller, John W. Graham, James S. Manning, John Manning and *Thomas Ruffin*, for the defendants.

SMITH, C. J. In the recent case of *Riggsbee* v. *Durham*, 94 N. C., 800; it was held, that the enactment by the General Assembly for the maintenance of a graded school in the town of Durham (Acts of 1881, chap. 231), was unauthorized by, and in violation of the Constitution of the State, in its essential and connected provisions, and that the taxes contemplated by it could not be enforced. At the session of 1885, was passed an Act, which authorizes, upon an approving popular vote of a majority of those who may vote, the issue of bonds in the aggregate not exceeding $15,000; and the obtaining a loan upon them by the commissioners of Durham, to be expended "in the purchase and erection of suitable grounds and buildings for the Durham graded or public schools for white children," under the control and direction of the graded school committee, ch. 87, Private Acts of 1885.

The election provided for was held, and of the whole number of votes cast, (370), there were given 245 for, and 125 against the proposed loan, while the number of registered voters was 607, more than double the number of the favoring voters. The election being, however, in accordance with the statute, the result was declared and reported in writing by the inspectors of election to the board of commissioners of the town, who proceeded to dispose of the bonds, and in order to provide for the payment of interest and a fund to meet the obligations at maturity, on August 4th, 1885, levied a tax of eight cents upon the $100 worth of real and personal property, and (as we suppose, for such is the statutory requirement), thirty cents on each poll. The section (3) imposing this duty, contains a proviso, "that the tax collected from the colored population of the town shall be applied for the benefit of the public schools for colored children, as now provided by law in said town."

The present action on behalf of the tax payers, against the defendants, the officer charged with the collection of the

taxes and engaged in doing so, is to arrest his action, upon the twofold ground, that the purposes and objects of the law, by reason of its race discriminating features, are repugnant to the Constitution, and further that there have not voted a "majority of the qualified voters" of the town giving sanction to the loan, as required by Art. VII, §7, thereof.

It is unnecessary to review the discussions found in the case cited, and in *Puett* v. *Commissioners of Gaston*, disposed of at the same Term, (94 N. C., 709;) and we are content to pass upon the sufficiency of the last objection, the want of a compliance with the constitutional mandate, which is alike disregarded in the statute and in the action of the commissioners under it.

We have at the present Term, in *Southerland* v. *Goldsboro*, modifying somewhat the definition given by RODMAN, J., in *R. R. Co.* v. *Commissioners of Caldwell*, 72 N. C., 486, to the term "*qualified voters*" as used in Art. VII, §7, by confining it to those whose competency has been passed on in their admission to registration, as *prima facie* proof of the number; and of course this list being open to correction for deaths, removals and other causes subsequently occurring, and perhaps for intrinsic disqualifications existing at the time of registration, and error in admitting their names to the list.

But it may be suggested, that the defects not known to the innocent purchasers of these public securities, do not enter in to vitiate their obligatory force, when the vote has been officially counted and the result announced. This is true, as held in *Norment* v. *Commissioners of Charlotte*, 85 N. C., 387; and when those charged with the conduct of an election, have determined the facts necessary to its efficacy, *this being matter in pais*, it is to be taken as conclusively settled, as in that case, that "a majority of *all the qualified voters of the city*" had "voted in favor of a graded school." This is not our case. The commissioners to whom the vote is certified, determine the respective votes for and against the

issue of the bonds, and the majority thereof in favor of it "*as allowed by said Act for the purpose therein set out*," and that *all the requirements of said Act and of the law* have been duly and regularly complied with." They do not certify, nor could they on the returns made, that the constitutional majority of affirmative votes had been cast, and in this feature the case essentially differs from that of *Norment* v. *Commissioners, supra.*

The election is under the statute, which requires, not a majority of the *voters qualified* to vote, but only a majority of those who do vote, and this is all that is determined and declared by the board of commissioners, while the command in the fundamental law, as a limitation upon the capacity to contract a debt and levy taxes for its payment, outside of necessary expenses, is disregarded.

Now, while it may admit of question whether in the absence of an enabling power conferred, a municipal corporation can borrow money and issue public securities therefor, since the decision in *The Mayor* v. *Ray*, 19 Wall., 468, rendered by a bare majority of the Court in the negative, it cannot be doubted that when restrictions are imposed upon its exercise, they must be observed, and parties taking such securities under a statute which ignores the restraint, cannot occupy the position of innocent purchasers. Persons who receive them when issued under an unconstitutional act, are chargeable with a knowledge of their illegal origin, for they must inquire into the authority of those who undertake to put them out.

There are conflicting rulings upon the point whether the requirement of a majority of qualified voters to incur a debt is not in effect the same as a majority of those voting, but we do not feel at liberty wholly to ignore a provision and the difference between the terms used, as well as the deliberate conclusion arrived at in the case cited, in ascertaining the meaning of a clause intended to protect citizens

and tax payers against heavy and oppressive taxation, arising out of municipal involvement in the contraction of debts, the evils of which had been experienced. There are numerous restraints, some of them unusual, put upon the taxing power both of the State and its subordinate municipal bodies in the Constitution, indicating everywhere a distrust in its unlimited exercise and liability to abuse, which need not be enumerated, but which have come before the Court, and we cannot think, with all these safeguards, that it was intended to dispense with the approval of a majority of the qualified voters, and allow an inconsiderable fraction it might be, to determine the result. Indifference is not the test; an *active and expressed approval is necessary*, and this is ascertained by a majority of those entitled to vote. However forcible may be the reasoning, and however numerous the rulings in other States, which construe a failure to vote as an acquiescence in what is done by those who do vote, we cannot put such an interpretation upon our organic law, and thus dispense with one of its most protective provisions against the contracting of a municipal debt.

The injunction, then, ought to have been continued, and there is error in the refusal to do so. This will be certified for further proceedings in the Court below, according to this opinion.

Error. Reversed.

JOHN L. MARKHAM, in behalf of himself, &c., v. JAS. S. MANNING, Trustee, and THE DURHAM GRADED SCHOOL.

Schools—Race Discrimination—Municipal Bonds.

1. A law which directs that the funds raised by taxation from the property of whites shall be devoted to the schools for white children, and those raised from the property of negroes shall be devoted to the schools for negroes, is unconstitutional and void.

2. The points decided in the preceding case of *Duke* v. *Brown* affirmed.

(*Puett* v. *Com'rs*, 94 N. C., 709; *Duke* v. *Brown*, *ante*: *Riggsbee* v. *Durham*, 94 N. C., 800; cited and approved. *Railroad Co.* v. *Com'rs*, 72 N. C., 486; modified).

MOTION to continue an injunction to the hearing, in a civil action pending in the Superior Court of DURHAM county, heard before *Clark, Judge*, at Chambers, in Raleigh, on April 22d, 1886.

His Honor refused the motion, and the plaintiffs appealed.

The facts are identical with those of the preceding case.

Messrs. R. B. Boone, Joseph B. Batchelor and *John Devereux, Jr.*, for the plaintiffs.

Messrs. W. W. Fuller, John W. Graham, James S. Manning, John Manning and *Thomas Ruffin*, for the defendants.

SMITH, C. J. This action, resting substantially upon the same facts, differs from the case of *Duke* v. *Brown*, decided at this Term, in that it seeks to restrain the defendant from using the funds raised by a sale of bonds, in the purchase of a lot, and the erection of a graded school building thereon. The demand for this relief for the tax payers, is sustained by an undenied averment in the complaint, that the moneys collected by taxation from white property owners are to be spent exclusively in furnishing education to white chil-

dren; while such as are paid by colored property owners are to be alone applied to the education of colored children, and further, that a majority of the qualified voters of the town are not required by the statute to give, and in the election held to ascertain the popular will, did not give their sanction to the loan, as provided in the Constitution, Art. VII., §7.

It is alleged in the complaint, that while the larger number of those voting favored the loan on the conditions and for the purpose specified in the Act, they do not constitute a majority of those qualified to vote.

The answer, admitting the casting of the vote as alleged, avers under advice, that the favoring vote "was a majority of the qualified voters of said town." An explanation of the meaning of this averment is found in a subsequent part of the answer, which says: "These defendants are advised, that a majority of the qualified voters of said town, *within the meaning of the Constitution of the State of North Carolina, and the statute referred to, did vote in favor of*," &c., thus putting the same construction upon, and giving the same meaning to, the different expressions used in the Constitution and in the Act.

This must be deemed an assent to the allegation in the complaint as to the state of the vote, and so considered, it places this appeal in the same category as that of *Duke* v. *Brown*, and requires the same disposition to be made of it. After this ruling, preceded by the decisions in *Puett* v. *Commissioners*, 94 N. C., 709; and *Riggsbee* v. *Durham*, Ibid., 800; little if anything remains to be added.

The bonds are issued, and the money paid under proceedings which attempt to disregard the constitutional limitations put upon these municipal bodies, and purchasers, as well as others, are chargeable with knowledge of this want of power, and that which the Constitution forbids, cannot be made valid upon the ground of a misinterpretation of its

meaning, and this, more especially, in face of the construction given in *The Railroad* v. *Commissioners of Caldwell*, 72 N. C., 486; and our modified ruling at the present Term, as to the true import of the clause, do not in any manner injuriously affect the defence.

Adhering to the cases cited as to the effect of the discriminating race features which pervade the Act, we think there was error in refusing to continue the injunction to the hearing, and the appellants' motion ought to have been allowed. The appeal being from an interlocutory judgment, this opinion will be certified for further proceedings in conformity with it, to the Court below.

Error. Reversed.

J. H. ALDERMAN et als. v. W. L. RIVENBARK and wife.

Issues—Consideration—Mortgage.

4. No issue is necessary when the facts are not disputed.

2. Where A is indebted to B, by notes secured by a mortgage, and C executes his notes to B in satisfaction of the debt, who delivers up A's notes and cancels the mortgage, and A executes his notes, secured by mortgage to C for the same debt; *It was held*, that the discharge of the debt by B is a sufficient consideration, and that C can collect the notes of A and foreclose the mortgage, before he has paid the debt to B.

3. A bond to stay execution, which provides that the obligors will be responsible for any damages which may arise on account of the acts of the appellant in committing waste, &c., is not a *supersedeas* bond within the meaning of *The Code*, §§435, 554; which contemplate a bond upon which summary judgment may be rendered in the Supreme Court upon the affirmation of the judgment of the Court below.

4. Where the undertaking on appeal for the costs and the undertaking to stay execution are in one instrument, the appellee, upon filing

the proper proofs of the insolvency of the surety, is entitled to have the appeal dismissed, as prescribed by *The Code*, §554, but where the two undertakings are separate and distinct, the appellant has a right to have his appeal heard, although the surety to the undertaking to stay execution is insolvent.

CIVIL ACTION, tried before *Clark*, *Judge*, and a jury, at September Term, 1886, of PENDER Superior Court.

There was a judgment for the plaintiffs, and the defendants appealed.

The facts appear in the opinion.

Mr. W. N. Jones, for the plaintiffs.

No counsel for the defendants.

SMITH, C. J. The defendants being indebted to the partnership of Worth & Worth, executed their notes therefor, and made a mortgage to secure them to said firm. On April 7th, 1884, the present plaintiffs having substituted their own notes in place of those held by Worth & Worth, which were surrendered to the defendants and the mortgage deed satisfied and cancelled, the defendants executed, for the extinguished indebtedness due Worth & Worth, their two notes under seal, each in the sum of $750, payable respectively on the first day of January and July ensuing, to the plaintiffs, and at the same time to secure them, a mortgage of real and personal property. To recover judgment on their notes and payment thereof by a foreclosure of the mortgage and a sale of the property conveyed in order that the proceeds be applied in their discharge, is the object of the present suit, the summons in which issued on September 2d, 1885.

The facts are not controverted, but the defendants insist that the plaintiffs cannot proceed to enforce the mortgage and collect the secured notes, until they have first paid their debt to Worth & Worth; and further, that rents and

profits have come into their hands for which they should account before any order of sale is made. The record does not show that any issues were put in form and submitted to a jury, while it is recited in the judgment that the trial was before a jury, and that their findings upon all the issues were in favor of the plaintiffs. In the statement of the case is found a single issue—"does the defendant owe the sum of money demanded by the plaintiffs?"—to which the answer is yes. The facts not being in dispute out of which arises the question of law brought up by the defendants' appeal for review, with the ruling of the Court thereon, no issue as to them was necessary. The charge asked and refused, and that given instead, to which the exceptions are confined, while delivered, and reiterated as an assignment of error in the motion for a new trial, are as follows:

"Upon the trial of the cause, the defendants' counsel requested his Honor in writing to charge the jury, 'that unless, and until the plaintiffs in this action have paid the debt originally due by the defendants to Worth & Worth, they have no right to recover of the defendants the debt mentioned in the complaint and secured by mortgage, nor to the foreclosure of said mortgage.'

His Honor declined so to instruct the jury, but instructed them, 'that if the plaintiffs had paid off and taken up the defendants' note by their own note to Worth & Worth, it was immaterial whether plaintiffs' note to Worth & Worth had been paid or not.'"

There is no error in declining to give the requested charge, nor in that given in its stead. The surrender of the notes held by Worth & Worth to the defendants, and the satisfaction of the mortgage security, were a full discharge of the obligations of the defendants created by either, and as effectual for the protection of the latter as would be the same result, produced by payment in money or other article of value. This was ample consideration, in the view of a Court

of Equity, to sustain the obligations entered into with the plaintiffs, by whose assumption of the defendants' liabilities, this exoneration had been brought about. The facts authorized this ruling, as a matter of law, and without inferences or presumptions, to require the intervention of a jury to make. There is no error.

Preliminary to the hearing, the plaintiffs having obtained a rule against the defendants to which no answer was made, and upon a suggestion supported by affidavit, of the insolvency of the surety to the *supersedeas* undertaking entered into in the Court below, moved to dismiss the appeal under §654 of *The Code*. This enactment, providing for an appeal from a judgment directing the payment of money, and prescribing the form of the undertaking which shall suspend the issue of execution, declares that when subsequently, insolvency of the securities occurs, and a new undertaking shall be required and not be given, "the appeal *may*, on motion to the Court, *be dismissed*."

The statement on appeal settled by the Court, shows that the appellant was allowed to give an undertaking on appeal fixed at $25, which was executed, and the surety justified his sufficiency as prescribed by law. Of this no complaint is made. A *supersedeas* bond was also authorized, the amount being fixed at $700, which was also given and justified, of which a copy, separated from the transcript, is sent up with the papers constituting the case. This instrument, after reciting the action of the Court and an agreement that the appellant Washington L. Rivenbark will not commit or suffer waste to be committed on the premises, and if the judgment be affirmed he will pay for the use and occupation meanwhile, and further that he will make good any deficiency in the proceeds of sale to meet the debt and deliver possession, thus concludes: "Now, if the said W. L. Rivenbark shall prosecute his said appeal with effect, or in case he shall fail therein, and have the said cause decided against him, and

he shall neither commit or permit waste of the premises as aforesaid, and shall pay the value of the use and occupation of aforesaid premises, and pay any deficiency arising upon the sale of said mortgaged premises, until the delivery of possession thereof, then and in that case, this obligation to be void and of no effect, otherwise to remain in full force and virtue."

It is quite manifest that this bond is not to secure the fruits of an unsuccessful appeal, and the full recovery of what may be adjudged to the appellee in the appellate Court, but is taken as a subsidiary security against damages that may result from the suspension of action under the judgment, and the defendant being left in possession.

It does not conform to the requirements of the statute when it is to operate as a *supersedeas* or stay of execution, as provided in §§554 and 435 of *The Code*, the purpose of which is to have a summary judgment in the Supreme Court for what sum shall be there directed to be paid. There could be no such summary judgment entered upon it here, for it covers damages to be afterwards ascertained, and belongs to the further proceedings to be had in the Court below.

Besides these innate defects of the bond as an undertaking on appeal to be enforced in this Court, the sum fixed by the Court is wholly insufficient, being less than one half of the sum adjudged to the plaintiffs.

The parties seem to have taken this view, for their first movement towards obtaining other security was before the clerk of the Superior Court, and manifestly, there the relief must be sought.

Again, the cause is properly constituted in this Court by filing with the transcript the justified undertaking for $25, and the appeal ought not to be dismissed, under these circumstances, though if the undertakings were in one, so that the surety's insolvency would affect both, the appeal might be dismissed.

We have for the reasons stated declined to grant the motion to dismiss, and passed upon the merits.

Let this be certified for further proceedings in the Court below.

No error. Affirmed.

M. E. CADE v. H. P. DAVIS, Ext'r of WM. CADE.

Trusts—Statute of Frauds—Husband and Wife—Evidence— §590.

1. While trusts, unless annexed as an incident to a conveyance of the legal estate, cannot be raised by parol even when founded on a valuable consideration, they may be attached by agreement to such transferred estate and will be enforced.
2. Where an agreement is made between husband and wife, that the proceeds of a sale of the wife's land shall be invested in other land in the name of the wife, such agreement is within the provisions of the statute of frauds, and cannot be specifically enforced, but relief will be given the wife by declaring her to be entitled to the proceeds of her land, and *perhaps* to charge the land purchased with her money, with its payment.
3. Where a parol contract for the sale of land upon which money has been paid, is repudiated, the vendor is required to return the money, for he will not be allowed to retain both the money and the land.
4. Where a husband contracts with his wife to invest money received from a sale of her land, in other land, the title to which is to be taken to the wife, but instead he takes the title to himself, he must either execute his contract by conveying the land to his wife, or restore to her the money which he received from her estate.
5. Where the answer admits the purchase of land, it is unnecessary to produce the deed, and a witness may testify to circumstances attending the transaction, that are not in the deed, although he refers collaterally to the deed.
6. The fact of payment to a deceased person, for land purchased of him, can be proved, when neither the witness nor the estate of the deceased vendor are interested in the result of the action.

7. The succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death.

8. The common law is presumed to exist in other States, unless it is shown to have been changed by statute.

(*Smith* v. *Smith*, Winst. Eq., 30; *Dula* v. *Young*, 70 N. C., 450; *Carrington* v. *Allen*, 87 N. C., 354; *Gray* v. *Cooper*, 65 N. C., 183; *Lockhart* v. *Bell*, 90 N. C., 499; *McLean* v. *Daniel*, 3 Jones Eq., 394: cited and approved).

CIVIL ACTION, tried before *Boykin, Judge*, and a jury, at May Term, 1886, of CUMBERLAND Superior Court.

The defendant appealed.

The facts fully appear in the opinion.

Messrs. N. W. Ray and *Thos. H. Sutton*, for the plaintiff.
Mr. W. A. Guthrie, for the defendant.

SMITH, C. J. William Cade, the defendant's testator, in 1862 intermarried with the plaintiff at the residence of her father, J. C. Cunningham, in South Carolina, and she returned with him to his home in Cumberland, in this State, where they remained until soon after the army under Gen. Sherman invaded that section, when they removed to and occupied the house and farm of said Cunningham, under a contract of renting by him to her husband. Cunningham died in June, 1868, shortly after which the testator and his wife came back to their home in Cumberland.

While living in this State, a considerable sum of the personal estate, which the jury find to be $785, and to have been received some time in 1868, came into the testator's hands, besides which were paid him on November 29th, 1879, $2,900.00, by one J. C. Cottingham, for a tract of land lying in South Carolina, and which descended to the plaintiff, and were by her husband and herself sold and conveyed to him. The complaint alleges that this fund was received by the testator, and the jury so find, under a parol agree-

ment or understanding that he would secure the money so received to her. No part of this money has been paid or secured to the plaintiff, and as much as was needed was applied to the satisfaction of a mortgage on the testator's land in Cumberland on a debt of which the principal money was $2,300.00, due to J. D. Williams.

The answer, besides controverting the essential allegations made by the plaintiff, and upon which her equity to a provision out of the testator's estate, adequate to her full re-imbursement, depends, as an offset to the demand, alleges that he paid a large amount of liabilities of the deceased to creditors, and for repairs and taxes, as well as charges which properly fall on the plaintiff's separate estate, if such she has. The jury find upon an issue, that the deceased paid out $1,750.00 of his own money in relief and exoneration of the plaintiff's estate.

These are the results developed at the trial and determined by the verdict. We now propose to enter upon an examination of the exceptions taken during the progress of the trial before the jury.

I. The defendant objected to the admission of any evidence not in writing and bearing the signature of the testator or of his agent, to prove the alleged contract. The objection was overruled, and the testimony heard and exception to the ruling entered.

While trusts, unless annexed as incident to a conveyance of the legal estate, cannot be raised by parol, even when founded on a valuable consideration, they may be attached by a contemporary agreement to such transferred estate, and will be enforced. If the agreement had been that the fund should be invested in the purchase of other land in place of that surrendered by the plaintiff on such condition, a specific performance would not be coerced, because, being to secure an interest in land and unwritten, it would come under the operation of the statute of frauds. It was so expressly

held in *Smith* v. *Smith*, Winst. Eq., 30; and relief was given by declaring the wife to be entitled to the proceeds of the sale of her land sold in consequence of the contract, out of his estate, and perhaps to hold the land purchased with the money as security to her, had this been found necessary. To refuse all redress, would have been to enable the husband thus to acquire the property of his wife, and then repudiate the contract by which alone it was obtained, and practice a successful fraud upon her. As in other cases of a parol contract for the sale of land upon which money has been paid in the expectation of securing title, if the vendor repudiates the obligation because the contract is not in writing, he is required to return the money, for he will not be allowed to retain both, so must the husband who thus obtains the property of his wife, under a contract recognized in equity, execute his agreement, or restore what he has obtained under it

In *Dula* v. *Young*, 70 N. C., 450; a case which seems to have been relied on to sustain the ruling, but is not similar in all respects, the husband and wife entered into an agreement by which her land was to be sold, and the proceeds of sale used in the purchase of a specific tract known as the Elk Farm. Her land was conveyed, and the farm bought, but title thereto taken by the husband in his own name Both died leaving children, their common heirs, to whom the legal estate of the father, and the equitable estate of the mother descended, thus merging into one. The Court decided that what the husband ought to have done, had been accomplished by operation of law, and the heirs had acquired an absolute estate, not liable for the debts of their father, and no order for specific performance was necessary.

In the present case, there was no undertaking to do what would have been required to be put in writing, but in general terms to secure the fund and repay it, a very vague amount it must be admitted, and to enable his estate to receive this accession from hers, and then escape the condi-

tions of the acquisition would amount to a fraud, whether so intended or not, which a Court of Equity will not tolerate, and against which it will give redress.

This exception, lying at the root of the case, must therefore be overruled.

II. The defendant objected to so much of the testimony of J. C. Cottingham, contained in his deposition, as relates to his purchase of the plaintiff's land, and to whom he made payment, upon several grounds: (1). For that the transaction is contained in a deed of which itself is the best evidence; (2). For that in proving payment, he was testifying to a transaction with a deceased person; and (3). Because it was an attempt to prove title by parol.

None of these grounds of objection are tenable. The answer admits the conveyance of the land lying in South Carolina to the witness, and the production of the deed was unnecessary. The testimony is essentially of the circumstances attending the transaction, that are not in the deed, and the deed is referred to only collaterally. *Carrington* v. *Allen*, 87 N. C., 354, and cases cited.

2. The statement that the witness on examining the records found that the land had been devised by her father to the plaintiff, was but to satisfy his own mind as to the title There seems to have been no controversy upon this point, and it was a collateral inquiry.

3. The fact of payment to a deceased person for land bought of him, does not render the testimony incompetent under the interdict of *The Code*, §590. The witness has no interest in the result of this controversy, nor is the estate of the deceased from whom the land is derived interested in the action, or in the manner of its determination.

III. Similar objections were made to the testimony of J. D. Williams, in reference to the mortgage and its discharge, and to that of the plaintiff that the land sold by herself and

husband, was all that her father owned in South Carolina, and they are met by a like answer.

IV. The defendant opposed any proof from the plaintiff, that her husband had possession of cattle, mules and horses of her father's estate and disposed of them for his own use.

The admission of this evidence is warranted by the ruling in *Gray* v. *Cooper*, 65 N. C., 183; and *Lockhart* v. *Bell*, 90 N. C., 499.

V. To sustain the impeached credit of a witness of the plaintiff who testified to a conversation with the testator about moneys received from the plaintiff's estate, he was asked and allowed to state the confidential relations existing between them. This was to show the credit and confidence reposed in the witness, and while very feeble in effect, we see no objection to the admission of the evidence.

The other exceptions to evidence are abandoned, and we proceed to consider those referable to the charge given to the jury.

The defendant asked for the following instructions:

"1. That as the marriage of the plaintiff with defendant's testator took place in South Carolina in the year 1862, and the property in controversy came to the plaintiff in South Carolina, then as a matter of law the rights of the parties would be determined by the law of South Carolina and not by the law of North Carolina.

"2. In the absence of proof to the contrary, the rules of the common law relative to marriage and the rights of property thereunder, are presumed to prevail in the States of the Union.

"3. That by the common law, the defendant's testator was tenant by the courtesy in his wife's lands if she owned any, in South Carolina, and would not be chargeable with the rents thereof, and he would be entitled in his own right to any cattle or other personal property which she had at the time of marriage or might acquire after marriage.

"4. That the plaintiff, having set out in her complaint that her land and personal property were sold by the defendant's testator in pursuance of a contract by which he was to repay her the money realized from the same, or to settle upon her other property of equal value, she must prove by a preponderance of the testimony, that there was such a contract, and the terms of the same, before she can recover anything in this action.

"5. That if the jury shall be satisfied that there was such a contract, then the plaintiff must show: 1st. That the defendant's testator received actual money, and how much money, by sales of the plaintiff's property, and not drafts or other evidences of debt. 2d. That after the actual money so received by him, he misapplied the same, and how much, to his own use, and did not use the same for the support of himself and wife. 3d. That the burden is on the plaintiff to show the same.

"6. That by law, the husband is the agent of his wife, and any sales made by him of her personal property are presumed to be made with her consent, unless the contrary is made to appear by her.

"7. That as the marriage of plaintiff with defendant's testator took place in 1862, no contract between them as to her separate estate was valid, unless made in writing and in accordance with §1835 of *The Code*.

"8. That the plaintiff has introduced no evidence of a written contract, and no evidence tending to prove a verbal contract by which the defendant's testator promised to repay her for money received by him from sales of her separate property, or to settle upon her other property of equal value.

"9. That this is not an action wherein the plaintiff seeks to recover of the defendant the value of property wrongfully converted by his testator, but is an action founded on contract, and the plaintiff must stand or fall upon the contract

alleged in her complaint, which she must establish to the satisfaction of the jury by a preponderance of proof.

"10. That the admissions, if any, made by defendant's testator to plaintiff's witnesses, as testified to by them, do not in law amount to an estoppel, nor relieve the plaintiff of the necessity of proving by competent testimony, her title as set forth in her complaint, to the separate property claimed by her."

It is stated in preface to these instructions, that they were refused by the Court, but in the case on appeal, bearing the signature of the Judge, it is differently represented, thus:

"The Court gave the 1st and 2d instructions asked for by defendant, adding, however, that the jury must consider all the evidence in regard to the domicile of the parties, and that if they should find from the evidence that the plaintiff and defendant's testator had their domicile in South Carolina at the time when the property was received, then the rule of common law would prevail; but if, on the other hand, the domicile was in North Carolina at the time when the property was received, then the law of North Carolina would govern.

"The Court refused to charge that there was courtesy, because the evidence was that there had been no child by the marriage, and the wife had outlived the husband.

"The 4th instruction asked by defendant was modified by the Court.

"That 1st prayer under instructions No. 5 was refused; 2d was substantially given, and so was the 3d in so far as it related to the 2d.

"The Court refused to charge that a written contract to repay was necessary. The plaintiff had not introduced any evidence of a written contract between her and her husband.

"The 10th instruction asked by defendant was given. The other instructions asked by defendant were refused.

"The instructions asked by defendant during argument were in effect given, because the jury were told that they could not give plaintiff any rent money at all.

"The other instructions asked by defendant were refused."

The substance of the ruling of the Court upon the points presented in the defence is, that the title to the personalty received by the defendant's testator, depended upon the domicile of the plaintiff and her husband at the time when it was received by him, and was not, in the event of their having returned to that State, by the law of South Carolina, while the rents received were the testator's own property.

Now, we do not so understand the rule of law governing the succession to the personal estate of an intestate. "The universal doctrine now recognized by the common law, although formerly much contested," in the language of STORY, J., "is that the succession to personal property is governed exclusively by the law of the *actual domicile of the intestate* at the time of his death." This is supported by a long array of cases referred to in the foot note; Story's Conflict of Laws, §481. At the common law, which is presumed to be in force when not shown to have been changed by statute, (and so the jury were instructed,) the personal property, as soon as surrendered by the representative to the plaintiff, would *eo instanti* vest in her husband. Both were residing in South Carolina when the father of the plaintiff died, and their respective rights were then fixed, and it would be a strange result if, when surrendered by the personal representative in that State, under its laws the title to the descended goods should be divested out of the owner and transferred by virtue of our laws, so as to constitute the separate estate of the wife. The only authority looking in the direction of giving support to such a proposition and to which our attention has been called, is found in *McLean* v. *Daniel*, 3 Jones Eq., 394. But upon examination of the case, it will be found not to sustain the contention. The facts are these:

Mrs. Glass resided in the State of Mississippi, and dying intestate, left a slave, which under its laws became the separate estate of her daughter, Elizabeth R. McLean, who with her husband, were married, and had ever since the marriage, resided in this State. The slave was delivered to her husband in that State, and was brought by him into this. The decision was, that as soon as the slave was delivered to the husband for his wife, and brought under the operation of our laws, the property vested in the husband *jure mariti*, because by our law, whatever personal goods of this kind came to the wife, passed to the husband unfettered by the foreign law which undertook to secure it to her separate use, the extra-territorial force of which was not recognized here. But here the property has vested in the husband, and his retention was not repugnant to our law, and hence, however acquired, if lawfully acquired elsewhere, it must remain in him undisturbed.

The question, however determined, does not, in our view, affect the result of the action, for whether hers or his, it comes from an estate, the indebtedness of which he has discharged to the amount of $1,750.00, and must lessen *pro tanto* this counter-demand. As the value of the goods thus appropriated to his own use is found by the jury to be $785, its deduction from the sum expended, leaves a residue of $965, by which the proceeds of the sale of land are to be abated. So the claim for rents is disallowed rightfully, and these items, the proceeds of the land, the value of the converted personal estate, and the rents, one and all demanded in the complaint. The amount, then, for which the testator's estate is chargeable, ascertained by the verdict, will be reached by applying the excess of expenditures made by the testator over the value of the personalty received, to-wit, $965 from $2,900, in reduction of this latter sum to $1,935, with interest thereon from November 29th, 1879. For this sum the testator's estate is to be charged, and if

necessary, and the land redeemed from the mortgage remains, and there are no *bona fide* liens or rights of purchasers to be affected, the plaintiff will be subrogated in respect thereto, to the rights of the mortgagee.

Thus modified, the judgment is affirmed.

Modified. Affirmed.

JAMES S. DODSON et al. v. L. W. McADAMS, Ext'r.

Parent and Child—Grandparent—Presumption.

1. If a grandparent receives his grandchild into his family as a member of it, they stand in the relation of parent and child, and no presumption is raised of a promise on the part of the grandparent to pay the grandchild for services rendered such as a child generally renders as a member of the family.
2. The presumption against the promise of the grandparent to pay for services in such case, may be overcome by evidence of an express promise on his part to pay for such services.
3. Where the evidence was that a grandchild resided with her grandfather as a member of his family, and did household work for him, and he declared several times that he intended to give her a part of his property as he would his children, and that she should be paid for the services she rendered him: *It was held*, no sufficient evidence to go to the jury to prove a promise on the part of the grandfather to pay her for her services.
4. The services of a child to its parent, or of a grandchild, to whom the grandparent stands *in loco parentis*, to such grandparent, are not gratuitous, but are presumed in the absence of evidence of an express promise, to be rendered as a recompense for the care and protection extended to the child.

(*Hussey* v. *Rountree*, Busb., 111: *Hudson* v. *Lutz*, 5 Jones, 217; *Williams* v. *Barnes*, 3 Dev., 349; *Young* v. *Herman*, at this Term; cited and approved).

DODSON *v.* MCADAMS.

CIVIL ACTION, tried before *Connor, Judge*, at August Term, 1886, of ORANGE Superior Court.

The action was brought to August Term, 1885, to recover on an alleged contract between John Whitaker, the testator of defendant, and the *feme* plaintiff, that services rendered to the testator should be compensated in his last will and testament.

Defendant denied any such contract, and alleged that the *feme* plaintiff lived with testator as a member of his family, and only performed such services as were customary for a girl in her station in life, and when married, the testator, who was her grandfather, provided more amply for her than he had done for his own daughters on like occasions.

The plaintiff testified that she lived with her grandfather (the testator) from the time she was two or three years old until she was married, at the age of 23; that after she was fourteen she kept house, cooked, milked, churned, sewed, knit, spun and wove, washed and ironed, and assisted on the farm in planting and cultivating grain, cotton and garden; also assisted in hauling wood and crops. No one else in family except her grandfather, grandmother and herself.

On cross-examination she stated that she was about two years old when taken to her grandfather's to live. Her aunt (wife of defendant) was there then and remained until she (the aunt) was married, with a short intermission. Her grandfather was 86 years old and quite feeble, and he never cultivated more than three quarters of an acre of cotton, and there was nobody else to do the work except her grandfather and herself, except when he hired the harvesting.

George Sykes, witness for plaintiff, saw *feme* plaintiff in the field helping her grandfather haul oats one time; also saw her in the cotton patch.

Henry Ray, witness for plaintiff, was at the testator's sometimes; saw plaintiff working about the house as other girls; witness was a blacksmith, and testator owed him a small

account, one dollar of which was settled by plaintiff's sewing. When testator took her she was a mere child, and he said if she stayed with him he expected to give her a part, as he did his other children.

On cross-examination witness stated that plaintiff was there as a member of the family, and was treated as well as other girls.

J. L. Tate, brother and witness for plaintiff, was at his grandfather's Christmas, 1879, and heard him talk about repairing the house; said he was not able to do it; intended it for Emmie, (the *feme* plaintiff,) and she could do as she pleased about it; plaintiff was present.

Mrs. J. L. Tate, wife of above witness, at Christmas, 1879, heard testator say that when he was done with the house he intended it for the plaintiff, and she could do as she wished; plaintiff was present, but nothing was said about her services; have seen plaintiff cooking and doing work about the house.

Deposition of Mrs. W. Dodson, step-mother-in-law of plaintiff, was read as testimony for plaintiff, in which she states that testator was at her house after the marriage of plaintiff, and spoke in high terms of plaintiff, and said he intended she should be paid for her services to him; that Emmie had been a faithful child ever since she lived with him; she was really and truly willing to do anything he said, and she was a faithful child; she helped him to do any and all sorts of work a woman could do; there was nobody could do any more for him than Emmie did, and "she shall be and I intend she shall be paid for the work she has done."

George Riley, witness for plaintiff, six or seven years ago was cutting wood for testator, and heard him say that he intended the timber for the plaintiff after he was gone.

Mrs. McAdams, wife of defendant, as a witness for defendant, stated: I am a daughter of John Whitaker, the testator; plaintiff was a weak, sickly child, about two years

old; her mother was my sister and was very poor, and had a great many children; I asked her to let me take Emmie home, and father did so, and kept her until she was married; we expected she would go home when the war ended, but she did not; she had become attached to us and we to her; after she grew up father became dissatisfied with some of her associates, and he (the testator) asked her to go home, but she refused to do so; she was treated just as any other member of the family; helped my mother do her work, (cooking and other house work); and she did a good deal of weaving for the neighbors, but always kept the money, to which there was no objection.

This witness also stated that plaintiff had an abundance of bed clothes when married, which she with her mother's assistance made; the testator paid for her schooling one time; and she also went to a free school. When articles of dress were bought, the testator paid for hers if she had no money. When she moved away she was well provided for by the testator—household and kitchen furniture, and other things necessary for young people to begin housekeeping. "My father did a much better part by her than he was able to do for her (plaintiff's) mother or myself. My mother is now eighty-six years old, but was always an active, industrious woman, and up to within a year before plaintiff married, was able to do her own work."

On cross-examination Mrs. McAdams stated, that testator gave his personal property to her (this witness) and the plaintiff's mother, and his land to the witness's sons, upon condition they would care for their grandmother during life. Plaintiff did not refuse to leave because the testator had promised to make provision for her in his will.

Mrs. T. G. Mebane, witness for defendant, was on very intimate terms with Mrs. Whitaker, wife of the testator, and says she was very energetic and industrious—plaintiff was

treated just as a child in the family, but was taught to be industrious.

Patsey Brown, witness for defendant, lived near testator all her life, and is related to both parties to this suit; plaintiff was taken to the house of the testator when a mere child, and treated as one of his own children; her food and clothing would have been pay for a child treated as she was, until she was about twenty years old.

The following issues were submitted to the jury:

1. Did John Whitaker contract with *feme* plaintiff to compensate her for services rendered him, by a provision in his will, as alleged in the complaint?

2. What damage has plaintiff sustained by the breach of such contract?

3. Did the *feme* plaintiff perform services for the defendant's testator as alleged in the complaint?

4. Were said services rendered gratuitously?

5. What was the value of said services per annum for the three years prior to the time she left the house of John Whitaker?

The defendant asked the Court to instruct the jury:

1. That there was no evidence of a special contract that plaintiff should be compensated for services in the will of testator. This instruction was given.

2. That if the jury believe the plaintiff was there in the situation of a member of the family, and not as an hireling, she would not be entitled to recover. This instruction was refused.

3. The relation of grandfather and grandchild existing between the parties, and under the special circumstances of this case, the plaintiff having been taken to the house of testator when a mere infant, raises a presumption that the services were gratuitous. Instruction refused as asked.

4. In the absence of an express contract, a right of action accrued as the services were rendered on the implied promise,

and as there was no credit, the law implies that every month's services were to be paid for as they were performed. Instruction refused.

His Honor charged the jury, that the relation of grandfather and grandchild did not raise the presumption that the services of the plaintiff were gratuitous, but the jury might take into consideration all the circumstances under which the plaintiff was taken into and remained in the family, and if they believe such was the understanding between the parties, they should answer the issue in the negative. But if they believe that it was understood between the parties that such services were not gratuitous, they should find in the affirmative, and fix the compensation at such sum per annum as they thought upon the testimony was correct; that the burden of proof was upon the plaintiff.

There was a verdict and judgment for the plaintiffs, from which the defendant appealed.

Mr. John Devereux, Jr., for the plaintiffs, relied on the case of *Hauser* v. *Sain*, 74 N. C., 552.

Mr. R. H. Battle, (*Mr. A. W. Graham* also filed a brief,) for the defendant.

MERRIMON, J. It seems to be settled law—certainly in this State—that if a grandfather receives his grandchild or grandchildren into his family, and treats them as members thereof—as his own children—he and they are *in loco parentis et liberorum*, and hence, if the grandchild in such case, shall do labor for the grandfather, as a son or daughter does ordinarily as a member of the family of his or her father, in that case, in the absence of any agreement to the contrary, no presumption of a promise on the part of the grandfather to pay the grandchild for his labor arises; the presumption is to the contrary. The grandchild, as to his labor or services so rendered in such case, is on the same footing as a

son or daughter. And this is so, after the grandchild attains his majority, if the same family relation continues. This rule is founded, in large measure, upon the supposition that the father clothes, feeds, educates and supports the child, and that the latter labors and does appropriate service for the father and his family in return for such fatherly care, and domestic comfort and advantage. The family relation and the nature of the service, rebut the ordinary presumption that arises when labor is done for a party at his request, express or implied, of a promise on his part to pay for it.

Applying this rule, this Court held in *Hussey* v. *Rountree*, Busbee 111: that though a step-father is not bound to support his step-children, nor they to render him any service, yet if he support them, or they labor for him, in the absence of an express agreement, they will be deemed to have dealt with each other as parent and child and not as strangers. And, in the subsequent case of *Hudson* v. *Lutz*, 5 Jones, 217; Chief Justice PEARSON said, citing the above cited case with strong approval, that "the same principle applies to a grandfather and child, when the one assumes to act *in loco parentis*. In our case, (that then under consideration,) this relation existed to all intents and purposes. The circumstance that the plaintiff was illegitimate, has no bearing on the application of the principle; the 'old man,' in the fullness of his affection, forgave the transgression of his daughter, and allowed her and her child to live with him as *members of his family* up to his death. The relation of the parties rebuts the presumption of a special contract, and puts the idea that he was to be paid for furnishing a home, or they were to have 'a price' for work and labor done, out of the question. In the language of RUFFIN, Judge, such claims ought to be frowned on by the Courts and juries. To sustain them, tends to change the character of our people, cool domestic regard, and in the place of confidence, sow jealousies in families."

In such cases, the ordinary rules applicable to parent and child will be applied, and hence it is not presumed that compensation will be paid on the part of the grandchild for board and clothing, nor on the part of the grandfather for labor and services. *Hussey* v. *Rountree, supra;* Shouler on Dom. Rel., §273.

But, the presumption against a promise to pay for such labor may be overthrown by an agreement to pay for the same, appearing in terms or by any proper proof to establish the same, as pointed out in *Williams* v. *Barnes*, 3 Dev., 349; *Young* v. *Herman, Adm.*, decided at the present Term; Shouler on Domestic Rel., §§269, 274.

Now, it appears in evidence in the present case, that the *feme covert* plaintiff was the granddaughter of the testator of the defendant; that she was taken by and lived with him from the time she was two or three years old until she was married, at the age of twenty-three years; that after she was fourteen years old, she did much of the domestic work in and about her grandfather's home, and occasionally worked in his small crop; that she lived with him as a member of his family, and was always treated just as one of his own children; he paid for her education—such as she received—and when she was married, he provided for her just as it she had been his own child; he had said at some time, in the presence of two or three witnesses, that if she remained with him, he expected to give her a part, just as he would his own children; one testified, that he said he intended his house for her; another, that he said she was a good girl, and she should be paid for her work, &c. She occasionally did some work for herself.

Accepting the evidence as true, there was none to prove a special agreement as alleged, between the testator and the *feme* plaintiff, that he would make provision in his will for her as compensation for her services, and the Court properly so instructed the jury. The testimony of the *feme* plaintiff,

indeed of all the witnesses—the whole of it—went to prove that she lived with her grandfather as a member of his family, and she was uniformly so treated, she so worked, and there was no evidence to prove an express or implied agreement between herself and the testator, that she should receive from him compensation for her services, other than such as she received as a member of the family. His occasional casual declarations that he intended his home for her —that she was a good girl, and should be paid for her services, were not of themselves alone evidence to go to the jury to prove such agreement, although they, with other competent facts, might make such evidence. *Young* v. *Herman, Adm., supra;* Shouler on Dom. Rel., §269. By such agreement is meant the mutual assent and understanding of the testator and the *feme* plaintiff, appearing by express terms, or from such facts and circumstances as show it by reasonable implication. The assent and understanding of one of the parties, without that of the other, is not sufficient; there can be no agreement without such mutual assent and understanding, and this must expressly appear, or it must appear by just implication from the evidence.

The appellant in substance, requested the Court to instruct the jury, that if the *feme* plaintiff was simply a member of the testator's family and so treated, as the evidence tended to prove, then she could not recover. This the Court declined to do. In this there was error. The appellant, in view of the evidence, was entitled to that instruction, or the substance of it, which was not given. On the contrary, the Court instructed the jury, "that the relation of grandfather and grandchild did not raise the presumption that the services of the plaintiff were gratuitous." It is true, such services were not presumed to be "gratuitous," but they were in contemplation of law, nothing to the contrary appearing, rendered in consideration of the care, protection and advantage the *feme* plaintiff had and derived from her grand-

father, and the relation did raise the presumption that the plaintiff should receive only that compensation.

There is error. The appellant is entitled to have a new trial. To that end let this opinion be certified to the Superior Court according to law. *It is so ordered.*

Error. Reversed.

YANCY T. ORMOND v. THE FIDELITY LIFE ASSOCIATION OF PHILADELPHIA.

Life Insurance—Payment of Premium—Agent.

1. Where an application for a life insurance policy declares on its face, that payment of the premium is a condition precedent to the issuing of the policy, the policy is not in force until the premium is actually paid.
2. Any change in the health of the insured between the application for life insurance and the issuing of the policy, should be communicated to the insurer.
3. Where prepayment of the premium is made an essential part of the agreement, no agent can dispense with its requirement.
4. So, where the insured made application for insurance, and the application set out that the policy would not take effect until the premium was paid, but the agent of the insurer told the applicant that he could pay the premium either at that time, or when the policy was delivered, and the applicant elected to pay at the latter time, but died before the policy was received: *It was held*, that the policy never took effect and the insurer was not liable.

(*Whitley* v. *Ins. Co.*, 71 N. C., 480; cited and approved).

CIVIL ACTION, tried before *Shepherd, Judge,* at Fall Term, 1886, of GREENE Superior Court.

The parties to this action agree upon the following as the facts material to the decision of the question of law involved

in the action, and consent that judgment may be rendered thereon as on a special verdict.

The plaintiff and Margaret A. Ormond, on the 13th of November, 1884, made application for a policy of insurance in the defendant's company upon the life of Margaret A. Ormond for the benefit of the plaintiff. That said application was taken by one Thomas McGee, an agent of the defendant, and when the application was taken, the plaintiff asked said agent when he would have to pay membership fee and first year's dues, and the agent replied that it was customary to pay when the application was made, but some paid when the policy was delivered, and the plaintiff said he would pay when the policy was delivered. The agent, McGee, knew that the plaintiff was a man of high financial and social standing, and was satisfied that payment would be made when called for.

The agent, McGee, took the application to the general agents of the defendant, Midgett & McCullen, to whom the standing of the plaintiff was well known, and informed them of the circumstance attending the making of the application; said general agents forwarded it to the home office in Philadelphia; and on the 19th day of November, 1884, it issued the policy and forwarded the same to the general agents who, on the 24th of November, forwarded the same by mail to the plaintiff at Hookerton, without condition or explanation, or saying anything about the payment of the membership fee and first year's dues, inclosing therewith a receipt.

On the afternoon of the 16th day of November, 1884, said Margaret A. Ormond was taken sick, and a medical attendant was called to her on the 19th, and on the 21st it was discovered that she had pneumonia, from which she died on the 23d, having been confined to her bed from her first sickness on the 16th; that her sickness was not of such a nature as to cause any apprehension in her own mind or the minds of the members of the family, until the 19th.

By the only mail route from the postoffice of plaintiff and said Margaret A. Ormond, a letter mailed at said postoffice on the 16th, 17th or 18th of November, would have reached Philadelphia on the 19th, or Kinston, where the general agents reside, on the 20th. One mailed on the 19th or 20th would have reached Philadelphia on the 21st, or Kinston on the 22d; one mailed on the 20th or 21st, would have reached Philadelphia on the 25th, there being a tri-weekly mail from her postoffice to Goldsboro, N. C., on Tuesday, Thursday and Saturday. No notice was given the defendants of the sickness of Margaret A. Ormond until the 27th of November. The plaintiff having received the policy on the 25th day of November through the mail as stated, took the same on the 27th to the general agents, informed them of the sickness and death and the circumstances attending it, and asked them if the policy was all right; and they informed him that it was, and he paid them the membership fee and first year's dues, and they countersigned the receipt for the fee and dues, and at the suggestion of said agents, sent forward notice of death. Afterwards during the same day, one of the agents saw the plaintiff, and told him he was not sure that the policy was good. On the 8th of December, 1884, in consequence of a notice from the general agents, the plaintiff went to their office, and they informed him that they had been notified by the defendants to return to him the money, stating at the same time that they did not think it was necessary, but the plaintiff could take the money, and if his claim was established he could return the money. Upon this assurance, without intending to waive any right, he took the money.

The general agents, Midgett & McCullen, were managers for the States of North Carolina and South Carolina, and had authority to solicit and forward applications for insurance, receive and receipt for membership fees and first annual dues, by countersigning receipts signed by the presi-

dent and treasurer, to deliver policies, and appoint sub-agents.

This agreement of facts is made, reserving the question for the consideration of the Court, as to whether any parol evidence is admissible to contradict the statement in the policy that the membership fee and first year's dues were paid, as contended by plaintiff's counsel.

His Honor held that plaintiff was not entitled to recover, and that defendant go without delay and recover his costs. From which ruling and judgment the plaintiff appealed.

Messrs. W. C. Monroe and *J. W. Bryan*, for the plaintiff.
Messrs. J. Q. Jackson and *W. S. Campbell*, for the defendant.

SMITH, C. J., (after stating the facts). Among the clauses found in the application, made with the by-laws and by express words in the policy, a part of it, is the following:

"3. That under no circumstances shall the policy hereby applied for be in force, until the actual payment to, and acceptance of the annual dues by the Association or its authorized agent, during the life-time and good health of the party who is proposed for membership and insurance."

The policy itself contains a recital clause, declaring, "and whereas the first payment of such annual dues having first been received by the treasurer or an accredited agent of the Association," &c. Accompanying the policy and attached to it, is the form of a receipt used by the company in these words:

"*The Fidelity Mutual Life Association of Philadelphia, Pa.*
PHILADELPHIA, Pa., Nov. 19, 1884.
Office, 908 Chestnut St.

Received from the owner of Policy No. 6934, in the life-

time, fifteen dollars, for the annual dues, due the 19th day of November, 1884.

For terms of mutual agreement, see application and policy. } ARTHUR THATCHER, *Treas'r.* } D. G. HOUSE, *President.*"

At the foot of the receipt, and in the left corner, is the following:

"*Notice to Policy Holders:*

This receipt to be valid, must be signed by the president or treasurer of the Association, and in exchange therefor, cash or its equivalent be given by the holder of the policy at the date hereof, or within three days allowed by the Association. And when payment hereon is made to an authorized agent, such agent must countersign at the date of paying, as an evidence of payment to him."

Beneath the acknowledgment is this: "Countersigned at ....., ... , agent," but without any signature of the agent.

The policy thus with the attached receipt, plainly declares that the required precedent payment has not been made, and must be paid to the agent before the contract of insurance becomes complete and operative on the Association, and the policy becomes effectual.

Indeed, the recital seems to contemplate the payment as an essential condition of a valid delivery by the agents, to whom the policy was sent. Moreover, this must be "during the *life-time and good health*" of the party to be insured.

The policy, incorporating with it the other papers by reference, if it be deemed effectual from its date, and the delivery of it in the manner stated effectual, constitutes the contract between the parties, by which their respective rights and obligations are to be ascertained, and the dues were not paid until four days after the death of the insured. This

certainly was not a compliance with the fundamental conditions on which its validity was dependent.

The plaintiff insists, that the initiatory payment was dispensed with and waived by the soliciting agent at the time of taking the application, and if not then, by the unqualified transmission to him by the general agent of the policy received by them.

The facts do not warrant this contention. The plaintiff, in answer to his inquiry of the agent, McGee, when he would be required to pay, was informed that payments were sometimes made at the taking of the application, and sometimes when the policy was delivered, and in exercising his discretion, the plaintiff said he would pay at the later period. There was no waiver in the case, and the plaintiff, under the agent's advice, was but availing himself of an allowed option —a conceded right. There was no waiver by the general agents, nor had they authority to dispense with the prepayment, if indeed an inference of an intent to do so can be drawn from their act of forwarding the policy without countersigning the receipt. The actual receipt of the dues was indispensable to the efficiency of the insuring contract, and this being a provision in the application, is brought to the knowledge of the plaintiff and forms part of his contract. In *Whitley* v. *Life Ins. Co.*, 71 N. C., 480; it is declared, that a policy of life insurance is not binding until the premium is paid, a clause requiring prepayment being contained in the application; and further that any material change in the condition of the health of the insured, intermediate and before the consummation of the contract by payment of the premium, should be communicated to the company.

The clause under which the policy, and of course the contract consummated by its issue, became inoperative, is an underlying and essential part of the agreement, and no agent can dispense with its requirement. The policy, as we interpret its recital, makes this a prerequisite to its taking effect

by delivery, as does the form of acknowledging payment. The plaintiff therefore, knows that *actual payment* must be made, and that "*under no circumstances*" can the policy be in force without it is made.

We do not propose to enter upon other inquiries discussed with great learning, and after much research, on either side, such as the omission to give information of the sickness of the insured, and the explanation offered for the failure, and the period at which the contract became effective: and will only say, that as there are conditions in the policy not contained in the application, which constitute, after acceptance, part of the policy, it would seem that the plaintiff being at liberty to decline the added conditions, his assent to them would be necessary to a completed agreement. Without passing upon other matters, we put our decision, in accordance with numerous rulings in adjudged cases, upon the ground that the clause in the policy referred to, constitutes a condition precedent, and the waiver relied on does not dispense with it.

There is no error, and the judgment is affirmed.

No error. Affirmed.

JASPER HICKS et als. v. B. F. BULLOCK.

Deeds—Words of Inheritance—Will—Adverse Possession—Tenants in Common.

1. The Court will always give such interpretation to the words of a deed as will effectuate its purpose, if the words in any reasonable view will admit of it.
2. Where the words of inheritance only appear in one part of the deed, but the entire language is inartificial and badly expressed, but it appears from the entire instrument that it was the intention of the parties to pass the fee, the Court will construe the deed so as to pass the fee.

3. Where by will land is devised to a trustee, to rent the land and pay the rents over to a person during his life, the *cestui que trust* takes no estate in the land, but only the right to have the rents paid to him.

4. Where land is left to a trustee to receive the profits and pay them over to one person during his life, and after his death to convey the legal estate to certain remaindermen, one of the remaindermen cannot get a possession adverse to the trustee and his co-remaindermen by taking possession under a deed from the person entitled to receive the rents for life. Such possession does not become adverse until after the death of the person entitled to the rents for life.

5. An adverse possession for twenty years by one tenant in common is necessary to bar his co-tenants.

(*Ricks* v. *Pulliam*, 94 N. C., 225; *Staton* v. *Mullis*, 92 N. C., 623; *Bunn* v. *Wells*, 94 N. C., 67; *Cloud* v. *Webb*, 3 Dev., 317; *Caldwell* v. *Neely*, 81 N. C., 114; *Ward* v. *Farmer*, 92 N. C., 93; *Page* v. *Branch*, at this Term; cited and approved).

CIVIL ACTION, tried before *Shepherd*, *Judge*, and a jury, at Spring Term, 1885, of GRANVILLE Superior Court.

It appears that Howell Hicks and Frances Hicks, brother and sister, in 1842, entered upon, and continued in joint possession of the land in controversy, as tenants in common, until the death of Frances in 1847, claiming title thereto by virtue of two deeds of conveyance, copies of which are as follows:

"Know all men by these presents, that I, James Bullock, of the county of Granville and State of North Carolina, hath, for and in consideration of the sum of eighty-six dollars, to me in hand paid by Howell T. Hicks and Frances Hicks, both of the county and State aforesaid, the receipt of the same is hereby acknowledged, and himself fully satisfied, do, by these presents, give, grant, bargain, sell, enfeoff and convey unto the said Howell T. Hicks and Frances Hicks, one certain tract or parcel of land, lying and being in the county of Granville and State aforesaid, adjoining the lands of John Webb, William A. Gill and others, containing eighty-five acres and one half, more or less, this land being two equal

shares of an undivided tract of land called and known as the Scallion tract, containing three hundred acres, which land descended to the heirs of the late Charles Bullock, deceased, by the will of the late Jeremiah Bullock, deceased, these two shares, one being owned by me and the other by Louisa Laws, who is at this time under lawful age. I, the said James Bullock, do, by these presents, bind myself, my heirs, executors, administrators or assigns, to warrant and defend unto the aforesaid Howell T. Hicks and Frances Hicks, and their heirs forever, a good and lawful title for the aforesaid land against my heirs or the heirs of the aforesaid Louisa Laws, or the claim or claims of any person or persons whatsoever, to their own proper use, free from all incumbrances.

Given under my hand and seal, the 7th day of December, 1841.

The other deed was as follows:

"Know all men by these presents, that I, John N. Gill, of the county of Granville and State of North Carolina, have, for and in consideration of the sum of one hundred and eighty-nine dollars and thirty-seven cents, to me in hand paid, the receipt for the same is hereby acknowledged and myself fully satisfied, do, by these presents, give, grant, bargain, sell, enfeoff and convey unto Howell T. Hicks and Frances Hicks, both of the county of Granville and State aforesaid, three lots or parcels of land, lying and being in the county of Granville and State aforesaid, adjoining the lands of John Webb, William A. Gill and others, containing by estimation 127 acres, it being three equal shares of one undivided tract of land called and known as the Scallion tract, containing 300 acres, which land descended to the heirs of Charles Bullock by the will of Jerry Bullock, dec'd. And I, the said John N. Gill, having purchased of Edward Jones the two equal shares of the said Jeremiah Bullock and Joshua Bullock had in the aforesaid land; likewise having purchased of William Forsythe and wife three equal

shares in the said tract of land, making in the whole 127 acres, as above stated; quit all claim and relinquish all manner of right and title in the aforesaid lands to the aforesaid Howell T. Hicks and Frances Hicks. And do for myself, my heirs, executors, administrators and assigns, forever warrant and defend the right, title and estate of the aforesaid land unto the aforesaid Howell and Frances Hicks, to them and their heirs, forever, against all lawful claims or claim whatsoever."

The Court below held that these deeds were sufficient to pass the fee simple in the land embraced by them, and the defendant having excepted, assigned this as error.

Frances Hicks died leaving a will, in which she devised her interest in the lands mentioned, as follows:

"Item the second—I do hereby devise to my brother, Thomas Hicks, his executors and assigns, my undivided one half of the following tract of land, situate, lying and being in the county of Granville and State aforesaid, adjoining the lands of William A. Gill, John N. Gill and others, being the tract on which I now reside, and containing three hundred acres, more or less. In trust, nevertheless, and upon the following trust and confidence, to-wit: The said Thomas Hicks shall and may annually rent out my said undivided half interest in said tract of land, and the money arising from said renting he shall pay to my brother, Howell T. Hicks, or to his order, during the natural life of the said Howell T. Hicks, and the receipt of the said Howell T. Hicks for said rent shall be a sufficient discharge. And after the death of the said Howell T. Hicks, the said Thomas I. Hicks, trustee as aforesaid, shall convey said undivided interest in said tract of land to John T. Hicks, William Hicks, Eliza I. Hicks, Lucy J. Hicks, Sarah H. Hicks, Martha Hicks and Jasper Hicks, and such child or children as shall be born of the body of Sarah D. Hicks—the wife of the said Howell T. Hicks—so as to make them a good fee simple to said land."

Howell Hicks continued in the possession of these lands until the 15th day of October, 1853, when he executed a deed purporting to convey the whole of the land mentioned to John T. Hicks, who was his son, and one of the devisees named in the clause of the will above recited. He then took possession of the land, and he and those claiming under him, including the defendant, have ever since had possession thereof under known and visible boundaries, claiming under and by virtue of the deed so made to him by his father.

Howell Hicks died on December 9th, 1859.

Thomas Hicks, named in the clause of the will above set forth, died in 1883. This action was begun on the 27th of May, 1882.

The plaintiffs claim under the will of Frances Hicks, the material clause of which in this connection is set forth above, and devises to them, after the death of Howell Hicks, her undivided one half of the land in controversy.

The defendant contended on the trial, first, that the continuous possession of the land up to known and visible boundaries of himself, and that of those under whom he claims, beginning with that of John T. Hicks, under color of title, was for a longer period than *twenty years*, and adverse to Thomas Hicks, the trustee, and the plaintiffs, though they might have been tenants in common with those under whom he claims, and himself, and therefore his title became, and is perfect; and secondly, that if this is not true, then he and those under whom he claims, have such possession under color of title adverse to Thomas Hicks, trustee, and the plaintiffs, next after the death of Howell Hicks, on December 9th, 1859, for a longer period than *seven years*, and therefore his title became, and is, perfect. The Court declined to so decide, and such refusal is assigned as error.

There was a verdict and judgment for the plaintiffs, and the defendant appealed to this Court.

Mr. John Devereux, Jr., (*Messrs. Joseph B. Batchelor* and *Armistead Jones* were with him), for the plaintiffs.

Mr. J. W. Hays, for the defendant.

MERRIMON, J., (after stating the facts). It is not denied that Howell Hicks and Frances Hicks had the absolute title to the land in question, if the two deeds mentioned, made to them, were sufficient to convey the fee simple estate therein. That such was their purpose is manifest from their terms, phraseology and scope. They are, however, very unskilfully drawn. While each of them contains the essential words of inheritance, these words do not appear directly in their proper connection, and their constituent parts appear disorderly.

In such case, it is the duty of the Court to give the deed such interpretation as will effectuate the purpose clearly appearing, if the words and phraseology, in any reasonable view of them, will admit of it. Hence it was said in *Ricks* v. *Pulliam*, 94 N. C., 225; "the Court will have regard to the whole instrument, and not simply the orderly parts; it may, and ought, if need be, transpose words, clauses and sentences, and sometimes parts of sentences not in juxtaposition. Such tranposition, however, must be reasonable, render the whole instrument consistent, and give effect to the obvious intent."

The Court is anxious to ascertain and give just effect to the instrument to be interpreted. *Staton* v. *Mullis*, 92 N. C., 623; *Bunn* v. *Wells*, 94 N. C., 67.

The material parts and words of the first of the deeds before us, thus interpreted, must be read thus: * * * "do by these presents give, grant, bargain, sell, enfeoff and convey unto the said Howell T. Hicks and Frances Hicks, the land described, * * * to them and their heirs forever." Otherwise but a life estate will pass by the deed, and these important words of inheritance, found in it, and intended to have meaning and effective application, must be treated as having no meaning or effect. This cannot be allowed.

And for the like reason, the similar words and parts of the second deed, must be read thus: * * * * "do by these presents give, grant, bargain, sell, enfeoff and convey unto Howell T. Hicks and Frances Hicks, (the land described) * * * * quit all claim, and relinquish all manner of right and title in the aforesaid lands, to the aforesaid Howell T. Hicks and Frances Hicks * * * * to them and their heirs forever."

Thus read, the material words and parts found expressed in both deeds, have reasonable meaning and application, as well as the just effect clearly intended.

It follows then, that Howell T. Hicks and his sister Frances were tenants in common of the land in question, until her death in November, 1847.

By her will, she devised her part of it to her brother Thomas, in trust, that he should let the same, and pay the money arising from the rents thereof to her brother Howell, during his life-time. At his death, she directs Thomas to convey her one half of it to the plaintiffs.

Howell Hicks had no estate in his sister's one half of the land—he had only the right to have the money arising from the rents of it during his life-time, and his deed to his son, although it purported to convey the absolute estate in the whole of the land, only had the effect to convey his part of it—whatever that might be. He could not pass what he did not have.

Whatever equitable rights they may have had prior to that time, the equitable estate of the plaintiffs did not begin until the death of Howell T. Hicks, and their estate could not be prejudiced by the possession of John T. Hicks, to whom Howell conveyed, and who had the sole possession from and after the 15th of October, 1853, the date of his deed, until the 20th of March, 1856, when he sold the land to the appellant and H. Freeman, who then took possession thereof. This is so, because John T. Hicks was one of the

cestuis que trust, for whom the trustee, Thomas Hicks, held the legal title, and it would be a fraud on his part to hold possession adversely to his trustee, and to the prejudice of his *cestuis que trust*. He could not be allowed by such contrivance to defeat the legal title of the trustee and the equitable estate of the *cestuis que trust*, he being one of them, not then in existence, nor could the defendant be allowed to avail himself of the benefit of such possession. To do so would be unjust and inequitable.

The learned counsel of the appellant sought by an earnest and interesting argument, to convince us that at all events the defendant's title had ripened into a good one, by seven years' continuous adverse possession of the land, up to known and visible boundaries, with color of title.

Granting that the appellant had such possession, it was adverse to his co-tenants in common, and whatever difference of opinion there may have been on this subject in this State in the distant past, it is now well settled that it does not in such case have such effect. It requires such a possession continued for at least twenty years to defeat the estate of the co-tenant in common. The subject has been so fully discussed in numerous cases, it is only necessary to cite some of the leading ones *Cloud* v. *Webb*, 3 Dev., 317; *Caldwell* v. *Neeley*, 81 N. C., 114; *Ward* v. *Farmer*, 92 N. C., 93; *Page* v. *Branch*, decided at this Term. Judgment affirmed.

No error. Affirmed.

JOHN B. HAIR v. W. H. DOWNING.

Easement—Evidence.

1. In an action against the defendant for flooding the plaintiff's land, evidence is admissible to show that the plaintiff knew that the defendant claimed the right to drain his land through that of the plaintiff before he purchased it.
2. Where a party has the right to use a ditch to drain his land, he has the right to keep it open and clear from obstructions.
3. Where a man owns two tenements, the one dominant and the other servient, and sells them both to different parties, the easement passes with the legal estate of the tract to which it belongs, and the grantee of the servient tenement takes it subject to the easement.

(*Shaw* v. *Etheridge*, 3 Jones, 300; cited and approved).

CIVIL ACTION, tried before *Gilmer*, *Judge*, at November Term, 1886, of CUMBERLAND Superior Court.

There was a judgment for the defendant, and the plaintiff appealed.

The facts fully appear in the opinion.

No counsel for the plaintiff.

Mr. N. W. Ray, for the defendant.

SMITH, C. J. The plaintiff derived title to the land, alleged to have been injured by an overflow of water caused by the wrongful act of the defendant, in August, 1882, under the deed of N. L. Ray to him, made on December 4th, 1876, while the defendant obtained title to an adjoining tract from the same proprietor, executed nearly three years previous. This deed, after describing the land as lying on Alligator Swamp and by definite boundaries, annexes thereto these further words: "together with the privilege of a ditch eight feet wide, to be made, located and constructed so as to do the least damage to the land through which it will be necessary

to pass, in order to drain the above conveyed land into Alligator Swamp."

There was evidence that at that place there was an old ditch made in 1869 or 1870, and that in 1874, when Ray deeded to defendant Ray owned the land which plaintiff alleges is damaged; and Ray and Downing had both testified that there was no other way in which he, defendant, could drain the land he bought from Ray, but through that ditch to Alligator Swamp. Downing testified that he immediately deepened and widened it, so as to make it about four feet wide, and three to four feet deep, and that in August, 1882, he did nothing but clean the trash out of it; and there was evidence that the natural flow would carry water from defendant's land on the lands of the plaintiff.

The plaintiff was interrogated on his cross-examination, as was the defendant on his direct examination, as to the plaintiff having notice of the defendant's claim to use the ditch for drainage purposes, before he purchased the lower tract, and this evidence, after objection, was received and exception taken thereto. The defendant then testified to a conversation had between the parties in regard to the ditch and right of drainage, in which the defendant was told, that he "could go to the middle of the swamp with his ditch, and that no one could prevent it," &c.

We cannot see the ground of opposition to the proof that the plaintiff knew of, and recognized the easement attaching to the defendant's land, and its possible effect in impairing the value of that which he afterwards took a deed for, as a servient tenement.

The testimony was, that Ray and Downing, before the deed to Downing, went upon the land, which was then uncleared, examined the old ditch, and that that was the ditch which was intended to be deepened and widened by Downing so as to drain the land he was buying. There was testimony that the natural course and flow of water from

Upper Alligator Swamp, in which was the defendant's land, was round a point, and then through Lower Alligator, in which was defendant's land.

The plaintiff asked the Court to charge the jury that defendant has failed to prove an easement by grant:

1st. Because of the vagueness and uncertainty of the description contained in the deed from Ray to Downing, July 26, 1874.

2d. Because no servient lands of the grantor are described in said deed as being bound by the privilege of a ditch.

3d. Because the deed speaks of a ditch to be made, located and constructed; and there is no evidence of any ditch being made or located after the date of the deed, but the evidence is all directed to an old ditch, which from the evidence, was cut in 1869 or 1870.

The Court refused so to instruct the jury, and plaintiff excepted.

The plaintiff also requested the Court to charge, that if the jury shall believe from the evidence that the defendant, by means of cutting, deepening and widening the ditch, caused the water to flow upon plaintiff's land either, in greater quantity, or sooner than it would have done if left to the natural courses, in the absence of a right by grant or prescription so to do, he would be liable for any damage he might occasion thereby. That even if defendant had an easement under the Ray deed, it would only apply to the Ray land, and not to the other lands of the plaintiff, set out in the second cause of action of the complaint.

The Court gave this charge, and added, that Ray by his deed to Downing, could not give any right that would damage lands not his own, or that belonged to third parties.

The enlargement of the existing ditch in width and depth, was made soon after the defendant became owner of the upper tract, and it was conceded to be the only mode of drain-

age into the swamp by Ray, then owning the other tract. The only act charged upon the defendant, was his removal in August, 1882, of the trash that had accumulated in it, and the right to keep open a drain is a legal incident to the right to use it as such.

We do not advert to the terms in which the privilege to have a ditch of much larger dimensions is conferred in the deed; for while this is possessed also, and may be made effectual by proper proceedings to locate it, and might be more detrimental, if indeed this was necessary after the then owners had agreed that that existing should be used as such, we are of opinion that the servitude of the one to the other, existing when both belonged to one owner, remained when the severance was effected by the different conveyances. The easement passed with the legal estate in the tract to which it adhered, and in the like plight was the servient tenement conveyed to the plaintiff, whose rights, especially after full notice, cannot be superior to those of his grantor. "Where one having two tenements, and a gutter from one of them ran over or across the other, sold one tenement to one and the other to another, it was held that the easement and servitude of the gutter passed with the respective estates by the form of the grant." *Copes case*, Year Book, 11 Hen. VII, 25. "So where the owner built an aqueduct from a spring on his land to his dwelling, and granted the dwelling, the easement passed with it. *Nicholas* v. *Chamberlain*, Cro. Jac., 121; both above cases cited in Washburn on Easements, with other cases, at page 49, and following In Gould on Waters, §354, the doctrine is thus declared: "A grant by the owner of a tenement of part of that tenement, as *it is then used and enjoyed*, passes to the grantee by implication * * * * * all those easements which the grantor can convey, and which are necessary to the reasonable enjoyment of the granted property, and have been and are, at the time of the

grant, used by the owner of the entirety for the benefit of the granted tenement."

So it is said by another author, that where the terms of a grant are general or indefinite, so that its construction is uncertain and ambiguous, the acts of the parties contemporaneous with the grant, giving a practical construction to it, shall be deemed to be a just exposition of the intent of the parties. Ang. Water Courses, §363, and cases cited in note 1, and among them *Jonnison* v. *Walker*, 11 Gray, 426; and *Woodcock* v. *Estey*, 43 Verm., 522.

The effect of a conveyance of land, with the attaching easements, in transferring them also, is ruled in a similar way in *Lampman* v. *Milks*, 21 N. Y., 505; the Court declaring that the diversion of a natural stream into an artificial channel for relief from overflow, and the land in that condition being sold to different persons, they each take their respective estates, benefited or burdened with the easement.

The same doctrine is recognized in *Shaw* v. *Etheridge*, 3 Jones, 300. The suit was for obstructing a ditch, and the outflow of water from the plaintiff's land through it. The defendant, when owning both, had cut the ditch, and then sold the lower tract to the plaintiff. The Court charged that if the defendant obstructed the ditch after he sold to the plaintiff, or if additional obstructions were placed in the ditch so as to impede the flow of water from plaintiff's land, he was entitled to damages, and this charge was sustained.

The controversy seems to have been confined to the relations of the tracts derived from the same source, and our discussion does not extend to the allegations as to other lands of the plaintiff, made in the complaint. The drainage should be with the least injury to the lower land, consistent with its rightful enjoyment, upon the maxim, *sic utere tuo ut alienum non lædas.*

There is no error, and the judgment is affirmed.

No error. Affirmed.

JAS. W. GRANT, Adm'r, v. W. H. HUGHES, Ext'r.

Evidence—§580—*Executors and Administrators*—*Trustees Purchasing at their own Sales*—*Accord and Satisfaction.*

1. The compensation to which an attorney will be entitled for his services as counsel in collecting a note executed before 1868, does not give him such an interest in the note as to render him an incompetent witness under §580 of *The Code.*

2. Where it is alleged that a person bought land at a sale to make assets, for, and as agent of the administrator, the deeds passed between them are competent evidence to show the true nature of the transaction.

3. Where it is alleged that an administrator purchased the land of his intestate at a sale to make assets, for himself, it is not competent for him to prove that other fiduciaries have acted in the same way.

4. While a defendant has the right to have a plea in bar passed on by a jury before an account is ordered, yet he may waive the right to have it passed on by a jury at all, and by consenting to a reference, he waives this right.

5. Where an order of reference is made without objection or opposition, it is equivalent to consent, and is a waiver of the right to have the issue tried by a jury.

6. If a debtor or obligor pay a less sum than is due, either before the day it is due, or for the convenience of a creditor at a place other than that named, or upon any other consideration advantageous to the creditor, or as a compromise upon an honest difference as to the amount due, it is good as an accord and satisfaction, and discharges the debt.

7. The rule is well settled that a receipt for money does not come within the rule that parol evidence cannot be heard to vary a written contract.

8. A receipt for a specific sum, is not even *prima facie* evidence of an accord and satisfaction, but if the receipt expresses that it is "in full," an inference may be drawn that it is in full satisfaction.

9. So where an executor of a former administrator settled with the administrator *de bonis non*, a receipt expressed to be in full of amount due to the estate, is not an accord and satisfaction, and it may be shown that a larger sum was due.

10. *It seems* that an appeal will lie from an order of reference, where there is an undisposed of plea in bar, and the defendant objects to the reference on that ground.

(*Slocomb* v. *Newby*, 1 Murph., 423; *Molyneux* v. *Huey*, 81 N. C., 106; *Syme* v. *Broughton*, 85 N. C., 367; *Borden* v. *Gully*, 92 N. C., 127; *White* v. *Beaman*, at this Term; *Clements* v. *Rogers*, 95 N. C., 248; *Neal* v. *Becknell*, 85 N. C., 299; *Com'rs of Wake* v. *Raleigh*, 88 N. C., 126; *Atkinson* v. *Whitehead*, 77 N. C., 418; *McPeters* v. *Ray*, 85 N. C., 462; *Smith* v. *Brown*, 3 Hawks, 580; *McCullen* v. *Hood*, 3 Dev., 219; *Railroad Co.* v. *Morrison*, 82 N. C., 141; *Castin* v. *Baxter*, 6 Ired. Eq., 197; *James* v. *Mathews*, 5 Jones Eq., 28; *Compton* v. *Culberson*, 2 Dev. Eq., 93; cited and approved).

This was a CIVIL ACTION, tried before *Gudger*, *Judge*, at Fall Term, 1886, of NORTHAMPTON Superior Court.

The allegations of the complaint are in substance as follows: In February, 1875, E. J. Drewitt died intestate in the county of Northampton, and on the 3d day of that month, W. T. Stephenson, now deceased, was appointed and duly qualified as his administrator. The said W. T. Stephenson died early in the year 1876, leaving a last will and testament, which was immediately thereafter duly proved, and the defendant, W. H. Hughes, the executor therein named, duly qualified as such. The said Stephenson having died before fully administering upon the estate of the said Drewitt, the plaintiff was duly appointed and qualified as administrator *de bonis non* upon the estate of the said Drewitt, about the 1st of February, 1877. On the 14th of November, 1877, the plaintiff had a settlement with the defendant, Hughes, of the dealings of said Stephenson with the estate of said Drewitt, a large amount having come into the hands of said Stephenson, and upon such settlement there was found to be due the estate of said Drewitt from the estate of the said Stephenson, the sum of $119.23, which was paid to the plaintiff by the defendant. Among other amounts allowed the estate of the defendant's testator in said settlement, were two amounts, as of May 1st, 1875, of $257.50,

and $150.44, and interest $62.07, making the aggregate sum of $470.01, which purported to have been paid by said Stephenson on two bonds executed by said Drewitt to one Jos. Long The said Stephenson did not in fact pay the above sum, but instead, paid the sum of $225 on the 23d of March, 1875, and no more, and his estate was entitled only to credit for that sum and interest, and the plaintiff was entitled to receive $328.58, instead of $119.23. He was also entitled to $10.96, excess of commissions allowed in said settlement. That these facts constituted a fraud upon the estate of Drewitt, and the plaintiff did not know of them until a considerable time after the 14th of November, 1877.

For a second cause of action it is alleged: That having previously filed a petition in the Probate Court of Northampton county to sell the real estate of said E. J. Drewitt, the said Stephenson, by virtue of his office as administrator, and the decree of said Court for sale, did, on the 3d day of July, 1875, proceed to offer for sale the real estate of said Drewitt, when and where one R. T. Stephenson became the purchaser, he being the last and highest bidder, in the sum of $500, who immediately transferred his bid to one James D. Vinson, who was an attorney at law, and who was attorney for said W. T. Stephenson in the settlement of said Drewitt's estate, and drew up the petition and other papers in the proceeding for the sale of said land for assets. That said land sold for a grossly inadequate price, and said W. T. Stephenson recommended a confirmation of the sale, and reported that the same sold for a fair price. That on the 20th day of August, 1875, said W. T. Stephenson made a conveyance of said land to his said attorney Vinson, who on the same day re-conveyed the land to said W. T. Stephenson, professedly for the sum of six hundred dollars, but plaintiff is informed and believes and so alleges, that no money passed between said Stephenson and Vinson.

That on said 20th day of August, 1875, said Stephenson sold and conveyed the same piece of land to one Lawrence Lassiter, for the sum of one thousand dollars, on a credit of one, two, three, four and five years, ($200 being payable annually,) with interest from day of sale at 8 per cent. per annum. That by reason of the facts set forth above, said W. T. Stephenson realized the sum $500 which was not charged against his estate in said settlement on said 14th day of November, 1877, and that said sum should bear interest from the 3d day of July, 1875. That said W. T. Stephenson did not during his life-time, nor has his said executor since his death, ever accounted to the estate of said Drewitt for the sum aforesaid ($500) illegally gotten by him by his unlawful and wrongful dealings with the estate of his said intestate, said E. J. Drewitt.

That before the commencement of this action, demand was made upon said defendant by plaintiff for the payment of the amounts herein claimed, by letter addressed by plaintiff to defendant and placed in the postoffice at Jackson, in said county, for delivery to defendant, which said postoffice is the postoffice of the said defendant, and that defendant has failed to pay said sums or any part thereof. That the wrongful and illegal acts herein before complained of as having been committed by said W. T. Stephenson, were a fraud upon said Drewitt's estate, and were so intended by him at the time they were committed.

Wherefore plaintiff demands judgment:

1. For the sum of $220.31, with interest thereon from the 14th day of November, 1877, till paid.

2. For the sum of five hundred dollars, with interest thereon from 3d day of July, 1875, till paid.

The defendant, in answer to the first cause of action, admits the death of E. J. Drewitt and the qualification of Wm. Stephenson as his administrator; the subsequent death of Stephenson and the qualification of Hughes as his executor;

the appointment of Wright as administrator *de bonis non*, &c, and the payment of $119.23 on the 14th of November, 1877; but says that it was "in full of all that was due to the estate of the plaintiff's intestate from the estate of defendant's testator, and the plaintiff accepted the same in full payment and satisfaction thereof, and executed and delivered his receipt to the defendant accordingly." He denies knowledge or information, &c., as to the other allegations in the first cause of action, and requires proof.

To the plaintiff's complaint for his second cause of action, the defendant answers:

1st. That his testator sold the land mentioned in the complaint, pursuant to an order of the Superior Court of Northampton county, to constitute assets with which to pay so much of the debts of the said E. J. Drewitt as his personal estate was insufficient to discharge, and credited the estate of the said Drewitt with the whole of the proceeds thereof. He believes the sale was fair in all respects, and that his testator did not in any respect therein cheat or defraud the estate of the said Drewitt. J. D. Vinson, as assignee of R. T. Stephenson, became the purchaser at said sale, in good faith, as this defendant believes. The said W. T. Stephenson, after the sale was confirmed and the title passed to the said Vinson, purchased said land of said Vinson, and the defendant does not know, and has no reason to believe, that the consideration from the said W. T. Stephenson to the said J. D. Vinson, is or was other than that expressed in the deed from the said Vinson to the said W. T. Stephenson, to-wit, $600.00. The said W. T. Stephenson afterwards contracted to sell the same land to one Lawrence Lassiter, a colored man, without means or property, for one thousand dollars, on a long credit, and the said Lassiter has not yet been able to pay the purchase money; and at the commencement of this action has paid less than two hundred dollars of the principal of the purchase money.

2d. That he has no knowledge or information whether any of the other allegations of that part of the complaint constituting the second cause of action are true, and he demands strict proof thereof.

At Spring Term, 1884, Samuel J. Wright, former administrator *de bonis non* of E. J. Drewitt, having been removed by an order in the cause, and the present plaintiff, James W. Grant, appointed in his stead, the complaint was amended by adding thereto the statement: "that the facts alleged and set out in said complaint as constituting a second cause of action, were unknown to Samuel J. Wright, former adm'r, &c., at the time he had the settlement, referred to in the complaint, with defendant." By an order made in the cause at Fall Term, 1884, it was referred to B. S. Gay, Esq., "to pass upon all the questions and issues of fact and law raised by the pleadings, and determine what sum, if any, is due by the defendant to plaintiff, and report to the next term of this Court. This reference is without prejudice to either party."

The referee filed his report, finding, in addition to the facts alleged and admitted, the following:

When Hughes paid the $119.23 mentioned in the complaint and answer, he took the following receipt:

"Received of W. H. Hughes, executor of W. T. Stephenson, one hundred and nineteen dollars and twenty-three cents, in full of the balance due by said Stephenson's estate, who was administrator of E. J. Drewitt, as will be seen by reference to the foregoing statement of settlement and account.

SAMUEL J. WRIGHT,
Adm'r *de bonis non* of E. J. DREWITT.

Nov. 14th, 1877."

This receipt was written at the foot of a statement of an account of the dealings of Stephenson with the estate of Drewitt, which account gives the items of the receipts and

expenditures of Stephenson in the administration of said estate, and the same, together with the above mentioned receipt attached, was filed with and recorded by the clerk of the Superior Court and Probate Judge of Northampton county, on November 14th, 1877, and all the vouchers for the items of said account were also filed by the defendant at the same time with said clerk, &c., who at the same time audited said account.

That on March 23d, 1875, the estate of E. J. Drewitt was indebted to one J. J. Long by two bonds, which the said E. J. Drewitt had executed to said Long several years previously, and that said two bonds, including interest, then amounted to four hundred and seven dollars; that on said day the defendant's testator, the said W. T. Stephenson, while he was administrator of said Drewitt, bought in said bonds from said Long for two hundred and twenty-five dollars, and had them assigned to J. D. Vinson, who was his attorney and agent, for himself, (Stephenson); that in said account and settlement the plaintiff's intestate is charged with four hundred and seven dollars and ninety-four cents as principal money, and sixty-two dollars and thirteen cents as interest thereon, and the defendant's testator, Stephenson, is credited with said amount as having been paid by him in payment of said bonds; but in truth and fact Stephenson had compromised said bonds for two hundred and twenty-five dollars, and had only paid that amount therefor, and at that time was only entitled to be credited with two hundred and twenty-five dollars as principal money, and thirty-four dollars and thirty cents as interest.

That at the time of this settlement between said Wright as administrator, &c., and Hughes as executor, neither Wright nor Hughes knew that Stephenson had purchased said bonds for a less price than he had charged the estate of his intestate; and that the said Wright only discovered this fact in July or August, 1879.

That on March 15th, 1875, said Stephenson, as administrator of E. J. Drewitt, filed a petition for the sale of the land described in the complaint, in the Superior Court, making the heirs at law of said Drewitt defendants, for the purpose of making assets; and said land was duly sold by order of said Court by said W. T. Stephenson, under these proceedings, on July 3d, 1875, at Jackson, when one R. T. Stephenson became the last and highest bidder, in the sum of five hundred dollars, and immediately assigned his bid to one J. D. Vinson, who was declared the purchaser.

That said R. T. Stephenson bid for said land at the request and direction, and for the benefit of said W. T. Stephenson; and afterwards assigned his bid to said Vinson, at the direction of said Stephenson.

That on August 20th, 1875, said W. T. Stephenson, as administrator and commissioner, conveyed said land to J. D. Vinson, in pursuance of said sale, for the expressed consideration of five hundred dollars, and that Vinson immediately on the same day conveyed the same to said W. T. Stephenson for the expressed consideration of six hundred dollars; but that in truth and fact, no money passed either from Vinson to Stephenson or from Stephenson to Vinson therefor, or was intended to be passed, but that Vinson was acting throughout at the direction and for the benefit and as the agent of said W. T. Stephenson.

That on the same day, (August 20th, 1875,) said W. T. Stephenson conveyed said land in fee simple to one Lawrence Lassiter, for the sum of one thousand dollars, payable in five equal annual installments of two hundred dollars each, bearing eight *per cent.* interest from August 20th, 1875, the said Stephenson retaining title therein until all the purchase money should be paid, with the power reserved to sell the land in case of default in payment.

That only three of said notes for the purchase money have been paid by said Lassiter to said Stephenson or his execu-

tor, including interest, except about thirty dollars, but that no part of two of the said notes has been paid, and there still remains due of said purchase money the sum of about seven hundred and fifty dollars.

That said land at the time of the sale in July, 1875, was worth six hundred and fifty dollars, and that it is now worth seven hundred and fifty dollars, and is adequate security for the balance of said purchase money.

That at the time of the settlement between said Wright and Hughes, said Wright did not know that R. T. Stephenson had bid off the land described in the complaint at the request and direction of W. T. Stephenson, nor that R. T. Stephenson had transferred his bid to J. D. Vinson at the direction of W. T. Stephenson, nor that Vinson was acting as the agent of W. T. Stephenson, and purchased said land at his request and direction, and for his benefit, and conveyed the same to him without any consideration.

That at the time of the before mentioned settlement between Wright as administrator and Hughes as executor, the said Wright did not know that Stephenson had procured J. D. Vinson to purchase said land for himself, and that it was not a *bona fide* sale.

That in said settlement between said Wright as administrator and Hughes as executor, the said Hughes only accounted for five hundred dollars as having been received by his testator, W. T. Stephenson, from the sale of said land.

As conclusions of law the referee found:

I. That the estate of W. T. Stephenson was only entitled to credit for two hundred and twenty-five dollars, the amount actually paid by him in settlement of the two bonds due by E. J. Drewitt, his intestate, in the settlement between S. J. Wright, as administrator *de bonis non* of said Drewitt, and W. H. Hughes, as executor of W. T. Stephenson, in November, 1877, with interest on $225 from March 23d, 1875, ($225+$35.66=$260.66;) and the credits to said Stephenson's

estate, and charged against said Drewitt's estate in said set-settlement of $257.50, $150.44 and $62.07, amounting to $470.01, was erroneous and a fraud upon the estate of Stephenson's intestate, Drewitt, and was illegal, and that Stephenson's estate, instead of being credited with or allowed five per cent. commissions on $470.01, was only entitled to five per cent. commissions on $260.66, and that the amount of commissions allowed said Hughes as executor, &c., was $10.40 more than should have been allowed in said settlement.

II. That the purchase of the land described in the pleadings by said Stephenson, through J. D. Vinson, was a fraud upon the estate of his intestate, the said Drewitt, and that the defendant, as executor of the said Stephenson, instead of being charged with $500 and interest from July 3, 1875, in the said settlement, as the proceeds of sale of said land, should have been charged with one thousand dollars, the amount of its sale to Lawrence Lassiter, with eight per cent. interest thereon from August 20, 1875, or, in other words, the estate of E. J. Drewitt ought to have been credited with four hundred and ninety-four dollars and eighty cents more than was given credit in said settlement, on account of said fraudulent sale of said land, with eight per cent. interest thereon, from August 20, 1875, equal to five hundred and eighty-three dollars and nineteen cents, but this amount should be diminished by five per cent. thereof for commissions, $29.15, which would leave the additional amount to which Drewitt's estate was entitled to be five hundred and fifty-four dollars and four cents.

III. That at the time of said settlement, said Drewitt's estate, instead of being entitled to one hundred and nineteen dollars and twenty-three cents, was really entitled to seven hundred and eighty-four dollars and thirty-three cents in addition thereto.

The referee therefore decided that the plaintiff was entitled to judgment against the defendant, as executor of W. T. Ste-

phenson, in the sum of seven hundred and eighty-four dollars and thirty-three cents, with interest thereon at the rate of six per cent. per annum from November 14, 1877, till paid."

The defendant filed numerous exceptions to the report of the referee, which were overruled by the Court, and judgment was rendered in accordance with the findings of fact and conclusion of law therein for the plaintiff.

From this judgment the defendant appealed, and assigned for error the following:

1st. Because the Court overruled the defendant's exceptions.

2d. Because the plaintiff was estopped and barred of recovery by the settlement made on the 14th of November, 1887, between Wright, adm'r, &c., of Drewitt, and Hughes, ext'r of Stephenson.

3d. Because the Court, of its own motion, at Fall Term, 1884, ordered the reference before the defendant's plea in bar had been passed upon by the jury.

4th. Because the judgment is contrary to the law and the evidence of the case.

5th. Because of any and all other errors appearing upon the face of the record.

Messrs. R. O. Burton and *W. C. Bowen*, for the plaintiff.

Mr. T. N. Hill, (*Mr. R. B. Peebles* also filed a brief), for the defendant.

DAVIS, J., (after stating the case). The first exception to the ruling of the referee was the overruling defendant's objections to questions one and five asked witness R. B. Peebles by plaintiff, and admitting his answers, relating to the collection of the notes executed by Drewitt to Long. This objection was based upon the ground, that the witness was incompetent to testify to anything connected with the notes, they having been executed prior to August, 1868, and the

witness having had an interest in them, or in the collection of them.

This objection cannot be sustained. The compensation to which the witness was entitled for his services as counsel, gave him no such interest in the notes as would disqualify him. *Slocum* v. *Newby*, 1 Murphy, 423; *Molyneux* v. *Huey*, 81 N. C., 106; *Syme* v. *Broughton*, 85 N. C., 367; *Borden* v. *Gully*, 92 N. C., 127; and *White, Adm'r*, v. *Beaman, Ex'r*, decided at this Term.

The second objection was to the admission of the deed from J. D. Vinson to W. T. Stephenson, and the deed from the said Stephenson to Lawrence Lassiter.

It is admitted that the deed from Vinson to Stephenson (dated August 20th, 1875, for $600,) is for the same land as that conveyed by W. T. Stephenson, as administrator of Drewitt, to J. D. Vinson, and it was clearly relevant as tending to show the true character of the transaction.

The third objection was to the question asked R. T. Stephenson in regard to the transfer of his bid, and to the answer that it was assigned to J. D. Vinson at the request of W. T. Stephenson.

This, like the last, was admissible as tending to show the true character of the transaction.

The same witness was asked if he had not been in the habit of attending sales of land conducted by executors, administrators guardians, &c., and if he did not know that it was customary with them to get some friend to run up property, so as to prevent it from being sacrificed by an inadequate price, and if he did not know from his own experience and observation, that this has been often done by conscientious and honest men conducting such sales.

These questions were excluded as irrelevant and immaterial, and this is also assigned as error by the defendant. We suppose it was the purpose of the defendant, to show the

good faith of his testator, by showing that other fiduciaries had, under similar circumstances, acted as he had. In no view of this case can we conceive such evidence as relevant or competent, and there was no error in overruling the objection.

There were numerous other exceptions to the ruling of the referee upon questions asked by the defendant and objected to by the plaintiff, and to questions asked by the plaintiff and objected to by the defendant, which were immaterial and irrelevant, and which we deem it unnecessary to pass upon more particularly.

After a careful examination, we find no error in the judgment of the Court below in sustaining the ruling of the referee upon points of evidence and his findings of facts. But exception is taken "to all of the referee's conclusions of law, and to all he decides."

"For that the plea in bar set up by the defendant should first have been decided by a jury before reference was ordered, and he demands that his said plea in bar shall be tried by a jury. He should have found that the plaintiff was barred of recovery by Wright's settlement with Hughes."

This was the point chiefly relied upon by the defendant in this Court.

First, as to the demand that the defendant's plea in bar shall be tried by a jury. Undoubtedly the defendant had a right to have his plea in bar, or any other issue of fact, passed upon by a jury, but this right may be waived, as authorized by Art. iv., §13 of the Constitution. Was it waived?

The order of reference was made at Fall Term, 1884, without objection, but the defendant says, "before his plea in bar was passed upon by the jury." If he wished to have it passed upon by a jury, he should have claimed the right before the reference was ordered, for when matter in bar is relied on, it ought to be determined before the reference is had. It puts in issue the very cause of action, and

the defendant has a right to have it first passed upon, because, if decided in his favor, the delay and expense of a reference may be avoided. *Clements* v. *Rogers*, 95 N. C., 248; *Neal* v. *Becknell*, 85 N. C., 299; *Commissioners of Wake* v. *City of Raleigh*, 88 N. C., 126.

While the record does not show that the reference was by consent, the order was made by the Court, without objection or opposition, and this was equivalent to assent and a waiver. *Atkinson* v. *Whitehead*, 77 N. C., 418.

If, at the time the order of reference was made, the defendant reserved the right, as was done in the case of *McPeters* v. *Ray*, 85 N. C., 462, to have the issue passed upon by the jury, it would have availed him; but this was not done, and if the suggestions had been made, it would have been at once apparent in this case, that the issue should, if insisted upon, be determined by a jury before the reference, and if refused, an appeal would lie.

It was earnestly insisted that the receipt given by Wright, administrator, &c., to Hughes, executor, &c., was conclusive, if not as a receipt, then as an accord and satisfaction, and we were referred to numerous authorities to sustain this view. We regard it as well settled, that parol evidence is inadmissible to vary or contradict a written agreement or contract, and we regard it as equally well settled, that if a debtor or obligor pay a less sum than is due, either before the day it is due, or, for the convenience of the payee or obligee, at a place other than that named, or upon any consideration advantageous to the payee or obligee, or as a compromise upon an honest difference as to the amount due, it is good as an accord and satisfaction, and binding; and we think the authorities relied on by the defendant do not go beyond this.

In *Smith* v. *Brown*, 3 Hawks, 580; relied on by the defendant, the written paper contained something more than a mere receipt for money. TAYLOR, C. J., said: "It is true, that by

a variety of decisions, receipts do not appear to be subject to the operation of the rule, (the rule excluding parol evidence), because they do not contain evidence of a contract, but when, in addition to the receipts for money, a condition is added upon which alone a party shall become liable to a further payment, it assumes the nature of a contract, and must be governed by the same rule of evidence." So in *McCullen* v. *Hood*, 3 Dev. 219; it was held that a receipt for a specific sum was not even *prima facie* evidence of accord and satisfaction. If the receipt had expressed that it was in full, "an inference," says HENDERSON, C. J., "might be drawn that it was in full satisfaction." It would have been evidence of satisfaction, but not conclusive. It was held not to be even evidence of a final settlement in the case of *At., Tenn. & Ohio R. R.* v. *Morrison*, 82 N. C., 141; and when fraud or mistake is alleged, it is never conclusive. *Costin* v. *Baxter*, 6 Ire. Eq., 197; *James* v. *Mathews*, 5 Jones Eq., 28; *Compton* v. *Culberson*, 2 Dev. Eq., 93.

The objection, "that the Court, of its own motion, at Fall Term, 1884, ordered the reference before the defendant's plea in bar had been passed upon by a jury," cannot be sustained, for causes already stated. The defendant had a right to object to the reference for the cause stated, at the time it was made, and it would have been valid; and if denied, it would have been the subject of appeal, but this was not done, and the result of the reference cannot be annulled by giving heed to the objection after the referee had made his report.

IV and V. "Because the judgment is contrary to the law and evidence of the case," and "for any and all other errors appearing from the record."

We think the finding of fact by the referee and his report in relation thereto, was properly confirmed by the Court below, and must be affirmed by this Court.

Was there error in the judgment upon the facts found? The estate of the defendant's testator is charged with the

sum of $1,000, for which he had sold the land to Lassiter. This sale was made payable in five annual installments, and the report shows that about $750 of the purchase money is still unpaid, and, it may be, cannot be collected. The evidence shows that it was more than the land was fairly worth, and as the money has not all been collected, we think the better and more equitable rule would be to charge the estate of the defendant's testator with the value of the land, which the referee finds to be $750. Thus modified, the defendant executor would be charged $750, as the proceeds of the sale of land, instead of $500, as in the account, or $1,000, as in the judgment, and crediting the account with $225, the amount actually paid for the Long notes, and $35.66 interest thereon, instead of $470.01, as wrongfully credited in the account, the whole amount charged against the defendant executor would be $1,056.41, instead of $806.41, as in the account filed with the report of the referee, and the amount of his credit would be $597.06 instead of $806.41, as appears in said account. This would leave a balance of $459.35 due to the plaintiff administrator from the defendant executor, with interest from the 14th day of November, 1877, (the date to which the account was stated,) till paid, and the plaintiff has a right to have the same secured by a lien upon the land in question.

The judgment of the Superior Court thus modified, is affirmed. It is ordered that the costs of this appeal be paid by the defendant executor. Let this be certified.

Modified. Affirmed.

NOTE.—The plaintiff's appeal in this case was dismissed, on the ground that the entire controversy was settled by the opinion in the defendant's appeal.

KINSELEY, STOUT & KELLOGG v. JAS. H. RUMBOUGH.

Records of other States.

1. Records of other States to be used in evidence in this State, must have the attestation of the clerk of the Court whose record is offered, and the seal of the Court, if it have one. If there be no seal, this fact must appear in the certificate of the clerk; and the Judge, Chief Justice, or presiding magistrate of such Court, must certify that the record is properly attested.

2. In such case, it is not necessary that the Governor of the State should certify under the great seal of the State to the official character of the Judge who makes the certificate, nor that the clerk should make such certificate, under his official seal. The provisions of §906 of the Revised Statutes of the United States do not apply to records of Courts and judicial proceedings.

(*Lee* v. *Gause*, 2 Ired., 440; *Shown* v. *Barr*, 11 Ired., 296; *Warren* v. *Wade*, 7 Jones, 494; cited and approved).

CIVIL ACTION, tried before *Shipp, Judge,* at Spring Term, 1886, of MADISON Superior Court.

The cause of action alleged in the complaint, is a judgment of the Circuit Court of the county of Knox, in the State of Tennessee. The defendant having in effect pleaded *nul tiel record*, on the trial, the plaintiff put in evidence the transcript of the record of a judgment of that Court, authenticated in manner and form following:

"STATE OF TENNESSEE—*Knox County:*

I, E. W. Adkins, Clerk of the Circuit Court in and for the county and State aforesaid, do hereby certify that the foregoing is a full, true and perfect transcript of the record and proceedings had in said Court in the above entitled cause of *Kinseley, Stout and Kellogg* v. *James H. Rumbough*, as the same appears of record and remains on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Knoxville, this 27th day of October, 1880.

[Seal Knox Co., Tenn.] E. W. ADKINS, *Clerk.*"

"I, Samuel A. Rodgers, the Judge of the Circuit Court of Knox county, in the State of Tennessee, do hereby certify that the above certificate and attestation signed by E. W. Adkins, the clerk of said Court, and to which the seal of said Court is annexed, is in due form.

S. A. RODGERS,
Judge of the 3d Judicial Circuit of Tenn."

"STATE OF TENNESSEE—*County of Knox:*

I, Samuel A. Rodgers, the Judge of the Circuit Court for the county of Knox, in the State of Tennessee, do hereby certify that E. W. Adkins, whose genuine official signature appears to the foregoing certificate, is and was at the time of signing of the same, clerk of the said Circuit Court, duly elected and sworn in; that full faith and credit are due to his official acts; that the seal of said Court and that the said attestation is in due form and by the proper officer.

Given under my hand this day, February, A. D. 1882.

S. A. RODGERS,
Judge 3d Judicial Circuit of Tennessee."

The defendant contended that this authentication was not sufficient and in accordance with the act of Congress prescribing how such records shall be certified. The Court held it was sufficient, and this ruling is assigned as error. There was judgment for the plaintiff, and the defendant appealed to this Court.

Mr. Theo. F. Davidson, for the plaintiffs.
Mr. John Devereux, Jr., for the defendant.

MERRIMON, J., (after stating the facts). The Constitution of the United States, Art. IV., §1, provides that, "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

In the exercise of the power thus conferred, Congress, at an early period of the government, enacted the statute, (Rev. Stats. U. S., §905; *The Code* of N. C., vol. II., pp. 732–3), which among other things provides, that "the records and judicial proceedings of the Courts of any State or Territory, or of any such country, (any country subject to the jurisdiction of the United States), shall be proved and admitted in any Court within the United States, by the attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice or presiding magistrate, that the said attestation is in due form." The statutory provision is operative and binding everywhere in all Courts within the United States, and countries subject to their jurisdiction.

It plainly appears from its terms, that such records must have the attestation of the clerk of the Court whose record is offered in evidence, and the seal of that Court attached, if there be one. If there be no seal, this fact should appear in the certificate of the clerk. The purpose of this attestation of the clerk and seal, usually in the form of a certificate, is to identify the record in question, as truly set forth in the transcript. In addition to such attestation, the Judge, Chief Justice or presiding magistrate of the Court where the record is thus attested, must certify that the attestation is in due form of law in the State where it is given, the object being to give judicial assurance that the law of the State regulating the attestation of records as to form has been observed by the clerk. Thus the record will appear

when it is offered in evidence just as it would in the Courts of the State from which it came, and have the like faith and credit. These are the essential requisites of a proper authentication of the record and judicial proceedings of a Court of record in another State.

It is not necessary that the official character of the certifying Judge or magistrate shall be certified by the Governor under the great seal of the State, nor that the clerk of the Court shall certify under his hand and seal of office, that the certifying Judge or magistrate is duly commissioned and qualified. The provisions of the statute, (Rev. Stats. U. S., §906; *The Code* of N. C., vol. 2, p. 733,) prescribing how another class of records and exemplifications of books shall be authenticated, do not, as contended by the counsel of the appellant, apply to records of Courts and judicial proceedings; it is expressly otherwise provided. Records of Courts do not come within the terms, scope or purpose of these provisions.

The authentication of the record in question, while containing redundant matters, and two certificates of the Judge, when one was sufficient, contains all the essential requisites prescribed by the statute first above cited. The clerk attests the record by his certificate and signature and the seal of the Court annexed. This is full for the purpose. The Judge certifies fully and sufficiently that the attestation of the clerk is in due form of law. This is sufficient. *Lee* v. *Gause*, 2 Ired., 440; *Shown* v. *Barr*, 11 Ired., 296; *Warren* v. *Wade*, 7 Jones, 494; *Eaton's Forms*, p. 616; 1 Gr. Ev., §§504, 505, 506.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

NOTE.—The case of *Williams* v. *Rumbough*, argued at the same time as the above case, involved the same points.

SYME *v.* BADGER.

*ANDREW SYME, Adm'r. &c., in behalf of himself, &c., v. THOS. BADGER, Adm'r, et als.

Devastavit—Cause of Action—Statute of Limitation.

1. When an action is brought against an executor or administrator for a devastavit, and a judgment is obtained against him, the cause of action accrues at the time of the qualification, and the law in force at the time governs, but when the action is brought after the death of the executor, the cause of action accrues as against his real and personal representative, when such representative qualifies and gives notice to creditors.

2. A creditor may sue the real representative of a deceased debtor to subject the descended lands to the payment of his debt, where there is danger of loss from delay, without waiting for the settlement of the personal estate by the administrator.

3. Where it is sought to subject the descended lands in the hands of the heir to the payment of the ancestor's debts, he has all the defences since the Act of 1846, which changed the procedure, that he would have had to a *sci. fa.* before that Act, with the qualification that when the action was brought against the heir within seven years after the qualification of the personal representative, on a judgment already obtained against the personal representative, the heir cannot plead that the demand on which the judgment was rendered was barred, unless he can show that the judgment was obtained by fraud or collusion.

4. Under the provisions of the Act of 1715, if the debt be due at the death of the debtor, an action must be brought within seven years from the death, otherwise both the heir and the executor will be discharged, and if the action arose after his death, the action must be brought within seven years after the cause of action arose, or the Act will be a bar, provided the personal representative has paid over the assets.

5. By the provisions of *The Code*, §153, sub-sec. 2, an action is absolutely barred against both the personal representative and the heir, unless it is brought within seven years after the qualification of the personal representative and the advertisement for creditors, and nothing will defeat its operation, except the disabilities mentioned in *The Code*, or such fraud or other matter of equitable nature, as would make it against conscience to rely on the statute.

*MERRIMON, J., having been of counsel, did not sit on the hearing of this case.

6. Where an action was brought in 1877, against the administrator of a deceased executrix, charging a devastavit, which pended until 1885, when a judgment was rendered in favor of the plaintiff, who then at once brought an action to subject the lands in hands of the heir to the payment of the judgment; *It was held*, that the action was barred.

(*Blount* v. *Parker*, 78 N. C., 128; *Spruill* v. *Sanderson*, 79 N. C., 466; *Rayner* v. *Watford*, 2 Dev., 338; *Godley* v. *Taylor*, 3 Dev., 179; *Spear* v. *James*, 94 N. C., 417; *McKeithan* v. *McGill*, 83 N. C., 517; *Cox* v. *Cox*, 84 N. C., 138; *Lawrence* v. *Norfleet*, 90 N. C., 533; *Worthy* v. *McIntosh*, 90 N. C., 536; cited and approved. *Leach* v. *Jones*, 86 N. C., 404; *Hughes* v. *Whitaker*, 84 N. C., 640; *Badger* v. *Daniel*, 79 N. C., 386; *Lilly* v. *Wooley*, 94 N. C., 412; distinguished and approved).

This was a CIVIL ACTION, tried before *Connor*, *Judge*, at April Civil Term, 1886, of WAKE Superior Court.

The complaint alleges in substance, that George E. Badger died in the county of Wake in 1866, leaving a last will and testament, which was duly proved at the May Term, 1866, of the Court of Pleas and Quarter Sessions of said county, and that at the same Term, Delia H. Badger, the executrix named in the said will, duly qualified as such. That the said executrix, Delia H. Badger, died in November, 1876, without having fully administered the estate of her testator, and that thereafter, to-wit, on the 5th day of April, 1877, David M. Carter was duly appointed and qualified administrator *de bonis non*, with the will annexed, of the said George E. Badger, by the Probate Court of Wake county. That thereafter the said D. M. Carter died in 1879, intestate, without having fully administered the estate of said George E. Badger, and on the 10th day of March, 1879, the plaintiff Andrew Syme was duly appointed and qualified by the Probate Court of Wake county, administrator *de bonis non*, with the will annexed, of the said George E. Badger. That on the 2d day of January, 1877, the defendant Thomas Badger was duly appointed administrator of the estate of the said Delia

H. Badger, by the Probate Court of Wake county, and duly qualified as such. That the said Delia H. Badger, at the time of her death, was accountable to the estate of her testator, George E. Badger, for a large sum of money, which had come, or should have come into her hands as executrix, and for the collection of which, D. M. Carter, then administrator of George E. Badger, and others, commenced an action in the Superior Court of Wake county, on the 11th day of March, 1878, against the defendant Thomas Badger, administrator of Delia H. Badger, and others, in which action the plaintiff Andrew Syme, administrator, &c., was duly made a party upon the death of the said David M. Carter, administrator, &c., and thereafter such proceedings were duly had in the said action, that at August Term, 1885, of said Court, a judgment was rendered in favor of this plaintiff against the defendant Thomas Badger, administrator of Delia H. Badger, for the sum of $5,738.69, and costs, together with interest on the sum of $4,838.19 from the 31st day of August, 1885, until paid. That at the time of her death, the said Delia H. Badger was possessed of personal property not exceeding $1,500 in value, and was the owner in fee of certain real estate in the city of Raleigh, known as lot No. 10 in the plan of the city. That she left her surviving Joseph J. Williams, Richard C. Badger, Thomas Badger, George Badger, Sherwood Badger and Edward S. Badger, and Annie H. Faison, wife of Paul F. Faison, and Mary Hale, wife of Peter M. Hale, her only children and heirs at law. That within two years from the grant of letters of administration on the estate of the said Delia H. Badger, the defendant William R. Poole purchased the share and interest of R. C. Badger in her real estate, and likewise, within two years, the defendant Henrietta Martin purchased the share and interest of Mary Hale in the said real estate. That shortly after the death of the said Delia H. Badger, and prior to November 28th, 1878, Jos. J. Williams died intestate in the county of

Wake, leaving a widow, Eliza T. Williams, and the following children, to-wit, Margaret, Jos. J., Elizabeth, Sarah C., Alex. H., and Annie H. Williams, who are his heirs at law. All the said children were infants at the time of his death, and were then, and now are, residents of the State of Florida, and neither the said widow nor children have any property in this State. That on the 28th of November, 1878, a special proceeding for partition was commenced in the Superior Court of the county of Wake, wherein Paul F. Faison and wife Annie H. Faison, Wm. R. Poole, Sherwood and Edward Badger, and Thos. D. Martin and wife Henrietta P. Martin, were plaintiffs, and Thomas and George Badger, and Margaret, Jos. J., Elizabeth, Sarah C., Alex H. and Annie H. Williams, were defendants. The said special proceeding was instituted for the purpose of having the real estate of the said Delia H. Badger, in the city of Raleigh, partitioned among the plaintiffs and defendants as tenants in common thereof. Under the orders and judgments of the Court, duly rendered in the said special proceeding, Paul F. Faison, commissioner of the Court, sold the said real estate on the 22d day of March, 1879, in several parcels, for the aggregate sum of $11,300.00, and the said sales were duly reported to the said Court on the 25th day of March, 1879, and thereafter, to-wit, on the 7th day of April, 1879, confirmed by the said Court, and under the direction and judgment of said Court, deeds were subsequently made to the respective purchasers of the said real estate by the said commissioner, and the proceeds of said sale divided among the parties to said proceeding. That of the proceeds of the said sale, the sum of $1,497.62 was paid to Wm. R. Poole, the purchaser of the interest of the said R. C. Badger in the said real estate. The said sum was paid in sums as follows: $251.39 in April or May, 1879; $442.59 April 9th, 1880; $421.01 in April, 1881, and $382.93 in April, 1882. That the sum of $1,497.62 was paid to Henrietta P. Martin, the

purchaser of the interest of Mary Hale, as follows: $251.39 in April or May, 1879; $442.59 April 9th, 1880; $421.01 in April, 1881, and $382.63 in April, 1882. That shortly after the death of the said Jos. J. Williams, the defendant Jos. A. Haywood was duly appointed and qualified as administrator on his estate, and thereafter, upon a petition filed in the cause, and an order therein, the interest of the estate of the said Jos. J. Williams in said real estate, being the same in amount as that paid to Wm. R. Poole and Henrietta P. Martin respectively, was paid (less the sum of $51.91 paid to Eliza Williams as the cash value of her dower as the widow of J. J. Williams,) to the said Jos. A. Haywood, administrator of Jos. J. Williams, to make assets to pay the debts of his intestate; said sum was paid in like sums and at the same time as those paid to Wm. R. Poole and H. P. Martin. That after the institution of the said Special Proceeding, Edward S. Badger died intestate, and Sherwood Badger was duly appointed and qualified as his administrator, and upon a petition filed in said cause, and an order of the Court made thereon, the share of the said Edward S. Badger (except the sum of $251.39, paid to him in his life-time,) was paid in like sums and at like times as the others, to the said Sherwood Badger, administrator, &c., to make assets to pay the debts of his intestate. That the share of Geo. Badger, except the sum of $251.39, paid to him in April or May, 1879, was paid to the defendant Annie H. Faison, and since the receipt thereof, the said George Badger has died intestate in the State of New York, leaving no property in this State. That the share of the defendant Sherwood Badger was paid to him in like sums and at about the same dates as the others That Thomas Badger became the purchaser of a portion of the said real estate, which is fully described in the complaint, and that at the time of his purchase he had notice of the liability of the said Delia H. Badger to the estate of her testator, George E. Badger. That the said

Thomas Badger is still the owner of the said property, subject to a mortgage executed by him to the defendant Bettie Strange, now the wife of J. W. Atkinson, the said mortgage having been executed pending the suit wherein D. M. Carter, administrator, &c., was plaintiff and Thos. Badger *et als.* were defendants. That Annie H. Faison became the purchaser of a portion of the said real estate, (set out in the complaint by metes and bounds,) and that she purchased with notice, &c., and is still the owner of said real estate, subject to a mortgage executed to the defendants Henry Hentz, Theodore Eastmond, Peter A. Leman, L. S. Hentz and D. C. Hipkins, said mortgage having been executed pending the said action of D. M. Carter, administrator, &c., *v.* Thos. Badger, administrator, &c., *et als.* That the defendant W. W. Vass became the owner of a portion of said real estate, (described by metes and bounds in the complaint,) and is still the owner thereof, and that he purchased with notice, &c. That the defendant Henrietta P. Martin is possessed of a large separate estate in her own right.

The plaintiffs ask judgment that the land described in the complant, as purchased by the defendants Annie H. Faison, W. W. Vass and Thos. Badger, be sold and the proceeds applied to the payment of the judgment against Thos. Badger, adm'r, &c.

That the plaintiffs recover of Wm. R. Poole, Henrietta P. Martin, Sherwood Badger, Sherwood Badger, adm'r of Ed. S. Badger, and Jos. A. Haywood, adm'r of Jos. J. Williams, the sums paid to them respectively from the proceeds of the sale of said real estate, with interest from the date of the receipts of the several sums.

The defendants, except Jos. A. Haywood, administrator of Jos. J. Williams, file separate answers and amended answers, and among other and various defences relied on in the respective answers, there is one of the statute of limitations, common to them all, and fully set out in each answer. His

Honor held that the statute was a bar, and gave judgment for the defendants, from which the plaintiffs appealed.

Messrs. John Devereux, Jr., and *R. H. Battle*, (*Messrs. Sam'l F. Mordecai* and *Jos. B. Batchelor* were with them on the brief), for the plaintiffs.

Messrs. A. W. Haywood, Spier Whitaker, John Gatling, W. H. Pace, C. M. Busbee, (*Mr. Ernest Haywood* was with them on the brief), for the defendants.

DAVIS, J., (after stating the facts). George E. Badger died in 1866, and Delia H. Badger qualified as executrix of his will in May, 1866. Mrs. Badger died in November, 1876, and Thos. Badger qualified as her administrator on the 2d of January, 1877. This action was commenced on the 19th day of September, 1885, and all the defendants rely upon the seven years statute of limitation as a bar.

Section 153, sub-section 2, of *The Code*, prescribes for the commencement of action "by any creditor of a deceased person, against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law, for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor; and a creditor thus barred of a recovery against the representative of any principal debtor, shall also be barred of recovery against any surety to such debt."

This section, if applicable to the present action, is a complete bar to the plaintiffs' recovery. But the plaintiffs insist, that the cause of action is the devastavit of Mrs. Badger, as executrix, and relates back to the date of her qualification as such, and that it is governed by the law as it was prior to the 24th of August, 1868. *The Code*, §136, provides, that "this title," which includes §153, "shall not extend to actions commenced before the 24th day of August, 1868, nor to

cases where the right of action accrued before that date, but the statutes in force previous to that date shall be applicable to such actions and cases."

When did plaintiffs' right of action accrue against the personal or real representative of Mrs. Badger? It is difficult for us to conceive of an answer to this question, that would fix the period prior to the existence of such a representative.

This action is against the real representatives of Mrs. Badger, or their assignees to subject her real estate, or its proceeds, to the payment of a judgment rendered in favor of the plaintiff Andrew Syme, administrator *de bonis non*, &c., of George E. Badger, against her administrator, Thomas Badger, for a balance found to be due to her testator upon a settlement of her account as executrix.

In *Leach* v. *Jones*, 86 N. C., 404; relied on by the plaintiffs to sustain the position that this cause of action relates back to the date of Mrs. Badger's qualification as executrix, the question was, as to whether, in that case, the defendant Eliza H. Jones was entitled to a homestead in the land in controversy. She had qualified as executrix of L. Jones, deceased, in 1865, and upon a reference, there was a report made and confirmed in 1878, upon which she was adjudged guilty of a devastavit of the assets of her testator, and the judgment was against her, both as executrix and individually, by reason of the devastavit. She insisted, that she was not fixed with the devastavit until the report of the referee was confirmed by the judgment against her in 1878; the plaintiff, on the other hand, insisted that the devastavit was committed between the years 1865 and 1867, within which period it was her duty, as the law then was, to settle the estate. The Court held that it was immaterial to inquire when the devastavit was committed, if prior to the commencement of the action, for the liability of the defendant attached upon her qualification as executrix in 1865.

If this action had been commenced against Mrs. Badger as executrix in her life-time, and a judgment rendered against her as executrix, and individually, for the devastavit of the assets of her testator, the case of *Leach* v. *Jones* would settle it, for she could not have claimed the benefit of the Act of 1868. The law by which she was governed was that in force when she qualified as executrix; the law subjecting her personal and real representatives to the payment of her debts, is that in force when her administrator qualified and gave the required notice.

It is due and just to the memory of Mrs. Badger, that it should be stated that it is conceded by all, that the misapplication of the assets of her testator was under advice upon which she relied, and under the mistaken, but honest belief, that being a creditor as well as a devisee of her testator, and the devise and bequest to her having been intended by him, and so expressed in his will, as a payment and discharge of what he owed her, she had the right to use and apply the assets as she did, and there was no wrong intent on her part. See the case of *Syme, Adm'r, &c.*, v. *Badger, Adm'r, &c.*, 92 N. C., 706.

But the plaintiffs insist, that even if the action is governed by *The Code*, §153, sub-sec. 2, it is not barred, because it is in the nature of an equitable *fi. fa.* in aid of the judgment rendered at August Term, 1885, in the case of *Andrew Syme, Adm'r, &c., et als.*, v. *Thomas Badger, Adm'r, &c., et als.*, and for this he relies: 1st. Upon the case of *Hughes* v. *Whitaker*, 84 N. C., 640. That case is distinguishable from this. It was commenced in 1877, by the creditors of the deceased debtor, L. H. B. Whitaker, against his executors and others, "to secure the assets, personal, and such as were derived from a sale of the devised lands, which it is charged in the complaint, under a fraudulent combination among the defendants, have been illegally disposed of and appropriated to their own use." The prayer is, that this pretended alienation

be declared void, and the property secured and placed in the hands of a receiver, to meet the claims of the creditors.

The defendants, among other defences, relied upon the statutory bar of seven years, and to this the plaintiff replied that an action was commenced in the Superior Court of Law of Northampton county in 1867 or 1868, and within three years after the qualification of the defendants as executors, to recover, &c., and that the said action is still pending. SMITH, C. J., says: "Associating the facts alleged in the complaint, and in the replication, as the cause of action, the present suit aims to get hold of and secure funds belonging to the estate of the deceased debtor, which by alleged fraudulent contrivances, have passed into the hands of the other defendants, and which ought to be applicable to the recovery of the plaintiff, when his suit is favorably determined. * * * * * It is therefore in aid of and not a substitute for the pending suit. If the plaintiff, upon obtaining judgment in his first action, and failing to make his debt out of the executors, can then pursue the fraudulently alienated estate, and no delay can be imputed to defeat him, why may he not now pursue and secure it, to await the result of his other suit, so that it may not become fruitless? * * * * The pleadings do not show when the fraudulent alienations were made, whether after the first action was commenced or before, nor when the fraud was first discovered, and the primary action for relief in cases where the Courts of Equity alone could afford it, as in the present case, is only barred after the lapse of the limited time from the discovery, which alone puts the statute in operation." For this he cites C. C. P., §33, par. 9, (*The Code*, §251, par. 9,) *Blount* v. *Parker*, 78 N. C., 128, and *Spruill* v. *Sanderson*, 79 N. C., 466. In the case before us, there was no fraud or equitable element interposed to prevent the operation of the statute.

The point is not made, but in that case the administration

was taken out prior to 1868, and it was not governed by the present statute.

2. The plaintiff relies upon *Badger* v. *Daniel*, 79 N. C., 386, and *Lilly* v. *Wooley*, 94 N. C., 412. In the latter case, there is no reference in the opinion to the seven years statute, and the point was not before the Court, but the well settled doctrine is affirmed, that in the administration of the estate of a deceased debtor, his personal property must be first applied and exhausted before resort is had to the real estate. In that case, the obligors on the administration bond, except one, were insolvent, and he, though possessed of property in, and a resident of another State, had none in this. The Court below held, that this was a bar to any recovery against the debtor's real estate, until the remedy against the solvent surety had been exhausted. This was held to be error, and this Court declared that the creditor residing in this State, need not pursue his remedy upon the administration bond against a surety to it in another, and exhaust this source, before he can resort to the debtor's real estate found in this State.

It was an action in the nature of a creditor's bill, brought against both the administrator and the real representative, for the purpose of subjecting first, the personal property, and if insufficient, then the real property of the debtor to the payment of debts, and is authority for the position that the debtor may, where it is necessary to guard against the danger of loss from delay, sue the personal and real representative in the same action, without waiting an indefinite period for the settlement of the personal estate, before proceeding against the heir.

The case of *Badger* v. *Daniel* throws no light upon the construction to be placed upon the statute under review. That was an action brought in 1871, upon a cause of action prior to 1868, and was clearly governed by the statutes in force prior to that date.

All statutes of limitation in this State were suspended from May 11th, 1861, to January 1st, 1870, and seven years had not elapsed from the latter date, before Whitfield was made a party to the suit, which was in 1875. It is true that RODMAN, J., says, that "as his liability did not or does not accrue, until a failure of the personal estate derived from the testator to pay the plaintiff's debt, he is not protected by the statute." What statute? Not §153, sub-sec. 2, of *The Code*, for that did not apply to the action, as it was governed by the law as it was prior to August 24th, 1868, which was the Act of 1715, which declared that: "Creditors of any deceased person shall make their claims within seven years after the death of such debtor, otherwise such creditor shall be barred." Rev. Code, chap. 65, §11.

By re-enactment from time to time, this continued to be the law down to the 24th of August, 1868, and was the subject of careful and learned consideration in the cases of *Rayner* v. *Watford*, 2 Dev., 338; and *Godley* v. *Taylor*, 3 Dev., 179; and the construction then received, continued to be the settled law of this State as long as that Act remained in force. As the present act, by its express terms, fixes the same limit for actions against the real representative as against the personal, it may not be out of place to call attention to these cases.

In the former case, RUFFIN, J., said: "The Act of 1715 is in terms an unqualified bar, without any saving or exception in favor of any incapacity whatever. It seems to have been designed to be emphatically a statute of repose in favor of dead men's estates, without a single exception." And again, speaking exclusively for himself, he said, "unless the death of the debtor be the *terminus*, if I may use that expression, from which the time runs, there is no limitation whatever. * * * The only limitation in the statute, is from the debtor's *death;* and if the period begin not then, it can have no beginning nor ending, within this act."

Again, in the case of *Godley* v. *Taylor*, the same eminent Judge, in his dissenting opinion, after presenting his own views as to the absolute bar of the statute, gives his adhesion to the law as settled by the Court, which he declares to be as follows: "That if the debt be due at the death of the debtor, claim must be made within seven years from the death, otherwise, both the heir and executor are discharged; and that if the action arise after the death of the debtor, suit must be brought within seven years from the time the action accrued, or the *heir and executor* will in that case be also discharged; and if suit is brought against the executor within seven years after it arose, but after the expiration of the seven years from the death of the debtor, and the executor hath, at the time of suit brought, not paid over the assets, he shall answer the demand; but if he hath paid them over, he shall have the plea of fully administered found for him. But how it will be with the heir in this last case, is yet to be determined; though I take it, he is to be bound, in case there be no personal estate in anybody's hands, provided he be sued by *sci. fa.* within seven years from the falling due of the demand, when that happens after the death of the ancestor." The Act of 1846, changing essentially the mode of procedure to subject the real estate of the deceased debtor to the payment of his debts, was passed after the decision in *Godley* v. *Taylor*, but that act did not in any way affect the statute of limitations, and any defence which the heir might have had to the *sci. fa.*, was equally available upon the application of the executor or administrator for license to sell real estate to make assets, with the qualification that where the action was brought against the heir within seven years after the qualification of the executor or administrator, he could not interpose the bar of the statute to a demand which had been reduced to judgment against the executor or administrator, unless he could show that it had been obtained by fraud or collusion. This

is clearly established by the case of *Speer* v. *James*, 94 N. C., 417; and the cases there cited. That was a creditor's suit, prosecuted against the administrator and heir at law. Administration was granted on the 21st day of August, 1879, and the action was commenced on the 18th day of January, 1882, (within seven years,) and the question now before us was not presented in that case, and this is the first time this Court has been called upon to construe §153, sub-sec. 2, so far as it relates to actions against the real representative. It has often been considered in actions against the personal representative, and it seems to be well settled, that when seven years have transpired after the qualification of the executor or administrator, before the commencement of the action, and due advertisement has been made as required by law, the statute is a bar. *McKethan* v. *McGill*, 83 N. C., 517; and the cases there cited; *Cox* v. *Cox*, 84 N. C., 138; *Lawrence* v. *Norfleet*, 90 N. C., 533; *Worthy* v. *McIntosh*, 90 N. C., 536.

In the last cited case, SMITH, C. J., says: "The present statute is an absolute and unqualified bar, when its conditions are complied with, and gives, as was intended, a repose to the estate, and puts an end to the claims against it, unless suspended under the provisions of §164 of *The Code*."

If this be the proper construction of the statute in respect to the "personal representative," it is difficult to see how the same language in the same section, and same sentence, can admit of a different construction with respect to the real representative. Reasoning from legislation upon a kindred subject, the construction should certainly be as strong in favor of the heir as the personal representative, for it is provided by statute, that conveyances made by the heir "to *bona fide* purchasers for value and without notice, if made after two years from the grant of letters, shall be valid even as against creditors." *The Code*, §1442.

It seems to have been the purpose of the Legislature not to leave obstructions in the way of the free alienations of lands for a long period. There is but one period fixed by the statute from which it begins to run to bar an action by the creditor of a deceased person against his personal or real representative, and that is the qualification of the executor or administrator and his making the advertisement required by law.

It must begin to run then or never, and nothing will defeat its operation, except the disabilities mentioned in *The Code*, or such fraud or other matter of an equitable nature as would make it against equity and good conscience to rely upon the statute.

There are no disabilities or other equitable ground interposed in this case. The Court below held that the seven years statute of limitation was a bar, and gave judgment for the defendant. There was no error. Judgment affirmed.

Let this be certified.

No error. Affirmed.

C. W. OGBURN, Adm'r, v. N. H. D. WILSON et al.

Practice.

Where the judgment of the Superior Court, in a case remanded to it from this Court, carries out the decision rendered on the first appeal, it will be affirmed.

CIVIL ACTION, tried before *Clark, Judge*, at February Term, 1886, of GUILFORD Superior Court.

In this action the opinion of the Supreme Court having been filed, and the cause coming on for further hearing and

orders, the plaintiff, insisted that in accordance with said opinion, he was entitled to the part of the certificate (one-half) due to Charles Barringer, by the terms of the deed of trust executed by N. H. D. Wilson, on June 22d, 1878, if so much was necessary to pay the judgment heretofore recovered by plaintiff.

The defendant, Mary Wilson, assignee of Gwynn, contended that the security provided by Wilson's said deed of trust, was of the balance, if any, of the certificate of deposit after deducting therefrom the payments from the joint estate of Wilson & Shober, and there being in the hands of the trustees of Wilson, (admitted by both parties in open Court,) only about fifteen hundred dollars applicable to the payment of said certificate of deposit, which amount is far below the aggregate of the principal and interest thereof, she insisted that according to the opinion of the Supreme Court, the plaintiff was entitled to one half only of said fund in the hands of said trustees, less $500 already paid to him to be applied on his judgment heretofore recovered, and that she, as assignee of Gwynn, was entitled to the other half.

Upon considering the opinion of the Supreme Court, and the argument of counsel, the Court ruled that the trustees first pay the costs of this action, to be taxed by the clerk, then apply one half of the residue in their hands on the judgment of the plaintiff heretofore recovered, less the sum of $500 paid him by said trustees since the rendition of this judgment, and then the residue of the fund they will apply and pay to Mary J. Wilson, assignee of said Gwynn, and the residue, if there should be any, the said trustees shall apply to the creditors of the fourth class in said deed of trust of N. H. D. Wilson.

From this judgment the plaintiff appealed.

Mr. John Devereux, Jr., (*Messrs. John W. Graham, Thos. Ruffin* and *L. M. Scott* also filed a brief,) for the plaintiff.

Messrs. John H. Dillard and *J. T. Morehead* filed a brief for the defendants.

SMITH, C. J. The controversy, when this cause was before the Court upon the former appeal, 93 N. C., 115; was in reference to the secured debt represented by the certificate of deposit, and whether the intestate's estate, the other infant wards having received their full estate from the guardian, was entitled to the whole fund in the hands of the trustees applicable thereto, or to a part only. The ruling was, that the intestate's estate was "entitled to one half of what would have been distributed if Ella had not received her full estate."

Consequently, the plaintiff should be paid, less what has been already received, one moiety of what was due to the debt in administering the trust fund, and an equal share would sink into the *residuum* for the benefit of the party next entitled. If this fund, after deducting the costs of the action, should prove insufficient to meet the certificate in full, the apportionment must be of what is left applicable thereto. The appellant's contention, if sustained, would be to give nearly the whole fund to the plaintiff, leaving an inconsiderable part to pass over to the next secured debt, while under the ruling, it should share equally with him in the distribution. We cannot see how any misconception upon this point could arise in the interpretation put upon the former opinion.

Assuming the proper credits to have been allowed, we find no error in the judgment of the Court, which conforms to the adjudication heretofore made, and it is affirmed.

No error. Affirmed.

W. E. SPIVEY v. A. AND J. M. GRANT.

Evidence—Agricultural Lien—Mortgage—Description of Property in—Ambiguity—Usury.

1. Where a mortgage does not properly describe the property mortgaged, or where, being intended as an agricultural lien, it does not comply with the requirements of the statute, the objection cannot be made to the admission of the instrument in evidence, but goes to its legal sufficiency as a conveyance.
2. Where a mortgage is made of personal property for the purpose of obtaining supplies to make a crop with, which mortgaged property is claimed by a third party, it is competent evidence, to show by the mortgagor, any matters necessary to a full understanding of the case.
3. Where the property is described in a mortgage as "one horse," and the mortgagor only has one horse, the description sufficiently points out the property conveyed, and parol evidence is admissible to identify it, but if he has more than one horse, then it is a patent ambiguity, and nothing passes.
4. Where a mortgage conveyed "one yoke of oxen," and it appeared that the mortgagor owned four oxen when the mortgage was made, a charge which instructed the jury, that the oxen would none of them be included, unless they were satisfied that some particular two were usually worked together as a yoke, was held to be correct.
5. Where an instrument is intended by the parties to operate as an agricultural lien under the statute, but it fails to set out some essential matter so that it cannot take effect as such statutory lien, it will yet be given effect as a common law mortgage, if in form sufficient for that purpose.
6. Where several persons unite in executing a bond to a commission merchant for supplies to be furnished them, and one of them gives a chattel mortgage to secure the amounts advanced to him, which martgage erroneously recites the amount of the bond, but truly specifies the amount of the advances made to the mortgagor; *It was held*, that the variance was immaterial.
7. Where several persons unite in executing a bond, a change made by the obligee with the consent of one of them does not vitiate the bond as to him, whatever its effect may be as to the others.

8. Where a mortgage is executed to secure a usurious note, the usury only affects the interest and does not impair the validity of the mortgage.

9. The power of the Court to allow amendments so as to fit the complaint to the evidence, is too well settled to require discussion or citation of authority.

(*Blakeley* v. *Patrick*, 67 N. C., 40; *Sharp* v. *Pearce*, 74 N. C., 600; *Goff* v. *Pope*, 83 N. C., 127; *Rawlings* v. *Hunt*, 90 N. C., 270; cited and approved).

CIVIL ACTION, tried before *Shepherd*, *Judge*, and a jury, at Spring Term, 1886, of NORTHAMPTON Superior Court.

There was a judgment for the plaintiff, and the defendants appealed.

The facts fully appear in the opinion.

Mr. R. B. Peebles, for the plaintiff.

Messrs. W. C. Bowen and *T. N. Hill*, for the defendants.

SMITH, C. J. The defendant Adbeal Grant, against whom the plaintiff brings his action for the recovery of certain articles of personal property, and thirteen others belonging to the Roanoke Grange, entered into an arrangement with the produce and commission house of Jones, Lee & Co., of Norfolk, Va., to secure advancements to each in the cultivation of their several crops during the year 1883. It was agreed that the former should unite in giving a single bond for the aggregate of the sums desired, and that each should secure by deed in trust, his separate share thereof to the latter. One of the grangers, W. C. Woodruff, acted for the others in making the necessary arrangements to obtain the required supplies. In carrying out the agreement, the said Woodruff, Adbeal Grant, and their associates, made their bond in these terms, and bearing their signatures and seals:

"$2,341.05. On demand, 1st November, 1883, with interest from date at nine per cent., we owe and promise to to pay Messrs. Jones, Lee & Co., the just and full sum of two thousand three hundred and forty-one dollars and five cents. This 1st day of April, 1883."

At the same date, the defendant Adbeal Grant executed a deed in trust to the plaintiff, and under which he claims the personal property demanded in the action, which deed is in the following form:

"A. Grant, of the county of Northampton and State of North Carolina, is justly indebted to Messrs. Jones, Lee & Co., of the city of Norfolk, Va., in the sum of eleven hundred dollars, for which they hold a joint note given by A. Grant, J. C. Grant, R. S. Barham, W. P. Lowe, E. W. Spivey, W. H. Vaughan, W. E. Woodruff, B. T. Parker, S. C. Williams, J. H. Wood, J. A. Soaby, K. D. Vaughan, J. W. Spivey, being dated April 1st, 1883, and due November 15th, 1883, with interest at rate of 9 per cent. per annum, from date, and to secure the payment of the same, I do hereby convey to W. C. Spivey, of the county of Northampton and State of North Carolina, trustee, these articles of personal property, to-wit: eight mules, two horses, one yoke oxen, farming utensils on the Yellowly farm, and a lien on all the crops to be cultivated and made by me during the year 1883, according to an act of the General Assembly of North Carolina, entitled an act to secure advances for agricultural purposes. But on the special trust, that if I fail to pay said debt and interest on the same, on or before the 15th day November, 1883, then the said W. E. Spivey, trustee, may sell said property, or so much as may be necessary, by public auction, for cash, first giving twenty days' notice at three public places in said county, and apply the proceeds of such sale to the payment

of said debt and interest on the same, and pay the surplus, if any, to me.

Given under my hand and seal, this the 1st of April, 1883.

A. GRANT, [Seal.]

Witness: J. M. GRANT."

The deed, after probate and registration, with the note under seal, were sent to Jones, Lee & Co., who refused to accept them. Thereupon, one of the firm, representing it in the negotiations, and in the presence and with the consent of the said Adbeal and Woodruff, corrected the bond by changing the day of the maturity to the 15th of November, and the rate of interest to eight per cent., and the same reduction in the rate of interest was made in the recital in the deed in trust as well as in the registry.

The defendant J. M. Grant was permitted on application to interplead and set up title to the property in himself, and thus controvert the plaintiffs' claim. He asserts that the property, except the crops, together with a plantation, was purchased by himself and said Adbeal on December 22d, 1882, from Alanson Capehart, the title to the lands being retained until the fifteen hundred bales of lint cotton, to be delivered in annual parts during a series of years, the consideration agreed on, were all delivered, with other provisions contained in the instrument, not of special significance in the dispute. He further relies on a covenant or deed, of which the following is a copy:

"This is to witness and show, that whereas we, J. M. Grant and A. Grant, have jointly purchased of Alanson Capehart, a farm on Roanoke river, with all the stock, mules, horses, cattle and all the farming implements thereon, and did agree before the making the purchase, where the dividing line on the land should be, and that each one of us should take and cultivate his part of the farm as agreed upon, and

should divide all the personal property equally between us and use the same to best advantage in making the crops, and each one of us obligating to pay each and every year one half of the cotton we were mutually or jointly obligated to pay, as specified in the contract with said Capehart, which contract is now of record in register's office in said county.

"Be it known to all whoever it may concern, that it was and is understood between us, that all of said personal property as divided between us, should and shall be held, and the legal title to the same remain in us jointly, and if either of us should fail to or refuse to make our equal part of the payment as above specified, then and in that event, the title to said property shall be in the other, and it was and is further understood, that if either one of us should think or consider it to be to our advantage to exchange any of the stock thus held by us for other stock or property, then that which may be received in exchange shall be held in place of the other that was exchanged.

"In witness of our agreement or understanding as made between us at the time of making the purchase of said property jointly, we and each of us have hereunto set our hands and seals, this 29th day of October, 1883.

Witness: J. M. GRANT, [Seal].
H. H. GRANT. A. GRANT, [Seal]."

Issues were drawn up and submitted to the jury, whose responses thereto are as follows:

1st. The plaintiff is the owner of some part of the property mentioned in the contract, and the said J. M. Grant to none of that demanded in the complaint;

2d. The damages sustained by the wrongful withholding is $940.41, with interest to be added from December 1st, 1883;

3d. The value of the crops taken is $394.41, (which it is conceded is embraced in the damages assessed);

4th. The $2,341.05 bond was not after delivery, fraudulently altered by the obligees.

It was admitted that the property seized in the claim and delivery order has been converted by said J. M. Grant to his own use, and could not be restored in kind, and that $1,100 had been advanced to Adbeal Grant; and further, that the correct date of the deed to the plaintiff was March 1st, instead of April 1st.

Several exceptions were taken to evidence offered on the trial, to-wit:

I. To the admission of the deed to plaintiff, for that the crop and other personal property are insufficiently described, and that while purporting to create an agricultural lien, the instrument does not possess the statutory requirements. It is obvious that the objection does not lie to its introduction as evidence, but to its legal efficacy as a conveyance.

II. To the testimony of A. Grant in reference to the farm whereon the crops seized by the sheriff were grown in 1883; to his description of the property he owned when he made his deed; to his admission that he had paid no part of his debt, and that no money was paid when the deed was executed, and that money and supplies were furnished and used in the cultivation of the lands bought of Capehart; and to his explanation of the uses to which the advances were put.

We see no well grounded objection to this testimony as to facts which tend to elucidate and explain the matters in contention, and which was not only competent, but necessary to a full understanding of the rights and relations of the parties.

For himself, the said J. M. Grant on his examination testified, that when he became an attesting witness to the deed, he did not know of its contents; that himself and Adbeal Grant divided the property bought of Capehart, and each exercised no control over that taken by the other; and noth-

ing was said about its being, as a whole, responsible for the purchase money due the vendor.

W. C. Woodruff was allowed, after objection from the defendant, to explain the arrangement made between the firm of Jones, Lee & Co., and the members of the grange; the refusal of the firm to accept the large bond and the securing deed in its present form, and the alterations made in each by the consent of the maker of the deed, the firm, and the witness.

The testimony was admitted as showing the details of the transaction, the Judge remarking that the pleadings could be amended to conform to the facts proved.

The objection is equally untenable as were the others, and for reasons unnecessary to repeat.

We now come to the consideration of the substantial merits of the controversy, and to the contentions of the defendant as contained in the series of instructions asked. These in brief are as follows:

1. The variance between the large bond, and that recited in the deed as its consideration, and the absence of proof of the alleged indebtedness.

2. The want of explanatory evidence in reference to the change in the date of the maturity of the bond, the presumption being that the alteration was after execution.

3. The description of the chattels in the deed is too vague to render the conveyance operative.

4. There is a failure of proof that the farming utensils were on the Yellowly farm when the deed was made.

5. The deed professing to create an agricultural lien, and not conforming with the statute, cannot operate as such, nor has it any efficacy as a common law mortgage or deed in trust.

The Court did not give these directions, but instructed the jury that in considering the first issue, it was material for them first to determine whether at the time of executing the

trust deed, the property, seized was owned by A. Grant, or was so far under his exclusive control, as to authorize him to convey it; that it was in evidence that before the execution of said trust, A. and J. M. Grant had purchased land and personal property of Capehart, and that they had divided the land between them, and had also made a division of the property; that it was in evidence that the Yellowly place was a part of the land assigned to A. Grant, and that he cultivated the cotton seized in this action on the same, during the year 1883; that it was also in evidence that a part, if not all, of the chattel property seized, was purchased of said A. Capehart, and that they had actually divided the same, each having exclusive possession and control of his part, and that the part seized was a part of that which was assigned to A. Grant in the division.

The Court also charged, that if there had been such a division of the chattel property, and the same was final and absolute, that A. Grant had a right to convey his part by way of trust for money and supplies, and that as to the crop, if it was grown by A. Grant upon the Yellowly farm in 1883, and the same had been assigned to said A. Grant, and was under his exclusive management and control, that he would also have a right to convey the crops for the purpose of obtaining money and supplies to aid him in the cultivation of the same.

That if they found under these instructions, that the plaintiff had a right to make such a trust of said property, that before the plaintiff could recover, it was necessary for him to show that the property seized was conveyed by the trust; that said trust calling for two horses, and it appearing that at the date of the execution of the same, that A. Grant had more than two horses, and said horses not having been more particularly described, that the plaintiff could recover none of them; that if at the time of the execution of said trust, A. Grant had only eight mules, and the six seized were a part

of the same, then the same would be included in said trust; that if he had more than eight, or if the six seized were not a part of the eight, that none of the mules would be covered by the trust, and that plaintiff could recover none.

The Court further charged, that if the farming utensils seized by the sheriff were on the Yellowly farm at the time the deed in trust was executed, that they would be included in the deed, otherwise they would not be so included; that if the cotton seized by the sheriff was raised during the year 1883, on the Yellowly farm, it would also be included in said deed; that as to the oxen, there being four, and the deed calling for a yoke of oxen, they would not be included in the deed, unless they were satisfied that any particular two were usually worked together as a yoke, and there was but one such yoke.

The Court declined to charge the jury in reference to the alleged variances, as requested by defendant J. M. Grant, and charged the jury that if A. Grant had, under the instructions given, authority to convey the property by the trust, and had done so, under the instruction, and they believed that advances were actually made to the extent of $1,100 under said trust, that no part of the same had been paid, and that the note was given as testified to by Woodruff, and the transaction was such as he stated, and the money and supplies advanced under such agreement; that they would find for the plaintiff, otherwise they would find in favor of defendant.

As to the alleged alteration, the Court charged that it was incumbent on the plaintiff to satisfy the jury that the alteration in the deed and note were made by consent, and unless he did so, they would find the issue against him; that the law presumed that the alterations were made after execution.

The jury found the issues as heretofore stated.

The defendant J. M. Grant moved for a new trial:

Because of the admission of evidence excepted to, and for other alleged erroneous rulings made during the trial of the cause, and the directions given to the jury.

The complaint was amended so as to fit the facts in evidence, as before intimated, and to this, exception was also taken.

The assigned errors are now to be examined, and our first inquiry will be directed to the description of the property. The words in the deed are: "These articles of personal property, to-wit: eight mules, two horses, one yoke oxen, and all the farming utensils on the Yellowly farm, and a lien on all the crops to be cultivated and made by me during the year 1883, according to an act of the General Assembly of North Carolina, entitled an act," &c.

The interpretation put upon, and the legal efficacy given to this clause, are, we think, open to no just complaint on the part of the appellant, and as to the oxen, seems to be in keeping with the ruling in *Blakeley* v. *Patrick*, 67 N. C., 40; where it is decided, that a mortgage of ten new buggies, there being more than that number then on hand, without distinguishing them, passed no title to any, for want of identification. The Court said, "to vest the title or ownership in any particular buggies, it was necessary to set them apart, so as to make a constructive delivery, and effect an executed contract; in the absence of such identification, the agreement, as we have seen, was executory only." Acting upon this decision, the plaintiff was declared not to be entitled to two of the three horses owned by the mortgagor.

The charge in regard to the mules stands upon a different footing. The defendant had more mules than the number mentioned, and there was no separation of some from a larger number, all equally answering the description necessary. The possession of a single horse, and none others by the vendor in a conveyance of a horse, without more specific description, sufficiently points out and designates the animal to transfer

property to the vendee. In *Sharp* v. *Pearce*, 74 N. C., 600, the conveyance was of "one horse," and this was recognized as a sufficient indentification.

In *Goff* v. *Pope*, 83 N. C., 127, when parol proof was offered to show the article intended to be transferred, and even to correct a part of the false description, and heard, this language is used in the opinion: "A horse, a buggy or a cow is sold; how can the article be separated from others of the same class, except by the aid of parol testimony? The generality of the description, in many cases unavoidable, is latent ambiguity, discoverable when the object is sought, and removable by outside evidence of intent."

The law is fully discussed under the 7th proposition, in Wigram on Wills. The rule is, in such cases, to admit parol evidence for the purpose of identification, as if, in the case of *Blakeley* v. *Patrick*, *supra*, the parties had at the time selected and set apart the ten buggies, or had in some other manner shown which were meant, and this although the description was general and indefinite without such aid. Here there is no difficulty in ascertaining what horses are meant, for all are embraced, and there can be no need of a resort to other methods of finding out which were intended.

The case cited in opposition, *Kelly* v. *Reid*, 57 Miss., 89; does not refer to a single adjudication in support of the particularity required, and we think it an incorrect ruling upon principle and authority. A fair and reasonable rendering as to the crops, is to designate such as were to be grown on the Yellowly farm, on which were the implements to be used in making them.

If the intent of the parties was to execute an instrument, such as the statute authorizes, and they fail in some essential part of its requirements, and the instrument is nevertheless in form sufficient to operate as a conveyance under the general law, there is no reason why it should not be upheld. Indeed, the principle is expressly decided in *Rawlings* v.

Hunt, 90 N. C., 270; where the previous rulings on the subject are examined, and the correct rule laid down.

The objection based upon the non-production in evidence of any such note or bond as is recited in the deed, and consequent want of consideration, is without force.

1. The answer sets up no such defence, but insists that the bond as originally drawn was usurious—was annulled by the alteration made without consent of all the parties—and is inconsistent with the recitals in the deed.

While it is true the defendant Adbeal owes as well as the others the whole amount of the bond, his individual indebtedness for supplies furnished him would be, but for the bond, only $1,100, and this, which was to be secured by deed in trust, subsists independently, and is a sufficient consideration to sustain the deed.

But the discrepancy is more apparent than real. The language in the recital of the purposes of the conveyance, while not very exact, embodies the substance of the transaction as understood by the parties. It mentions the personal indebtedness of the maker as being $1,100, which is included in the joint bond executed by all whose names are given, and correctly described except in its erroneous mention of the day of maturity, and the security is provided and accepted for this separate portion of the debt. It is in no sense voluntary, but a conveyance made in pursuance of the general agreement, and to give it effect as to this one of the debtors. The change in the bond, whatever may be the effect upon others not consenting, cannot impair the efficacy of the security provided for the distinct and personal liability of Adbeal Grant for advances received by him, which subsists independently of the bond. Nor can the change in the rate of interest, assented to by him, made in the deed, impair its force as to him. Had it remained, it would have only affected the obligation to the extent of the interest, not the conveyance as a valid act.

The right to amend is too well settled to need comment. There is no error, and the judgment must be affirmed.

No error. Affirmed.

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*T. H. WOODLIEF et al. v. JAMES MERRITT et als.

Pleadings—Will.

1. When the pleadings are so confused and vague, as to leave it in doubt what the parties are contending over, this Court will not take cognizance of the cause on appeal.
2. Courts of equity will not entertain a suit for the construction of a devise, but will leave the devisee to assert his right at law, in an action to recover the land.

(*Vaughan* v. *Farmer*, 90 N. C., 607; *Council* v. *Averett*, 95 N. C., 131; *Busbee* v. *Macy*, 85 N. C., 329; *Busbee* v. *Lewis*, Ibid., 332; *Pearson* v. *Boyden*, 86 N. C., 585; *Tayloe* v. *Bond*, Bus. Eq., 15; *Simmons* v. *Hendricks*, 8 Ired. Eq., 85; *Simpson* v. *Wallace*, 83 N. C., 477; *Alsbrook* v. *Reid*, 89 N. C., 154; cited and approved).

CIVIL ACTION, tried before *Philips, Judge*, at January Term, 1886, of FRANKLIN Superior Court.

There was a judgment for the defendants, and the plaintiffs appealed.

Messrs. F. S. Spruill and *John Devereux, Jr.*, for the plaintiffs.
Messrs. C. M. Busbee and *C. M. Cook*, for the defendants.

SMITH, C. J. Looking to the allegations in the complaint, its principal purpose seems to be to obtain a construction of certain devises of land made in the will of Henry Merritt, who died in July, 1861, and the relief demanded, in case it

*DAVIS, J., having been of counsel, did not sit on the hearing of this case.

should be decided that a tract of fifty acres has not been disposed of in remainder, is that it be sold by a commissioner, as part of the residue, and the proceeds divided as directed by the testator. It states also, that the defendants Nancy Merritt and James H. Merritt are, and have been, in possession of the tract since the death of the widow, to whom it was given for life or during widowhood, and since her death, she being the executrix, no administration *de bonis non* has been granted on the testator's estate.

The answers of the defendants Nancy and James H. deny the construction contended for by the plaintiffs, and insist upon a different interpretation of the clauses of the will out of which the controversy arises, and, if not sustained by the Court, ask that the will be remanded for probate in a connected form, to carry out the intention of the testator.

The defendant William H. Merritt in his answer also undertakes to interpret the will, and claims to be tenant in common with the defendant Nancy, who with James H. are in possession, and demands partition, and damages for her exclusive occupancy, in the way of rents and profits.

We reproduce so much of the pleadings as will show that the parties, while agreeing in the one object of obtaining an authoritative construction of the several devises, in order to the determination of their rights to certain real estate, there seems to be no common understanding among them as to the nature and purposes of the action, aside from ascertaining and giving effect to the testator's intention. If there were none other, the confused statements contained in the pleadings would be a sufficient reason for our refusing to take cognizance of the cause on the appeal, since it is indispensable to the due administration of the law, that it should be properly presented, and the controversy disclosed in the conflicting allegations and demands.

But as a case for the advice of the Court as to the effect of certain provisions of a testamentary disposition of land be-

tween the legal claimants, the invoked jurisdiction cannot be entertained. If its object be for partition, after a declaration of rights, it should have been begun before the clerk, and there is no averment in the complaint of any common possession, no demand of partition, and the specific relief sought is a sale to be made by a commissioner.

If the sale be the end aimed at, it would have to be made by an administrator *de bonis non cum testamento annexo*, and none such has been appointed and is before the Court. *Vaughan* v. *Farmer*, 90 N. C., 607; *Council* v. *Averett*, 95 N. C., 131.

But the fundamental defect in the case, consists in its calling for the exercise of an equitable jurisdiction in advising upon a question of pure legal right, when there is no obstacle to bringing a suit at law, and no trusts involved, in executing which the trustee seeks the authoritative guidance of the Court. Where a party is in possession and cannot sue, under certain circumstances he can apply to the equitable jurisdiction to have removed a cloud upon his title. But he will not be aided when the way is open to a suit at law. *Busbee* v. *Macy*, 85 N. C., 329; *Busbee* v. *Lewis*, Ibid., 332; *Pearson* v. *Boyden*, 86 N. C., 585.

The principle is thus stated by PEARSON, J., in *Tayloe* v. *Bond*, Busb. Eq., 15: "The Court cannot, for instance, entertain a bill for the construction of a devise. Devisees claim by purchase under the devise as a conveyance. Their rights are purely legal and must be adjudicated by Courts of law."

The same rulings have been made in *Simmons* v. *Hendricks*, 8 Ired. Eq., 85; *Simpson* v. *Wallace*, 83 N. C., 477; *Alsbrook* v. *Reid*, 89 N. C., 154.

The last case is very similar in this aspect of it to that before us.

It is unnecessary to pursue the subject further. The action must be dismissed without prejudice, and it is so adjudged.

Dismissed.

THOMAS D. HOLLEY v. SALLIE D. HOLLEY et als.

Processioning—Estoppel—Former Judgment—Amendments.

1. Where the rights of parties have been once judicially determined, it is irregular and improper to attempt to do away with the effect of the judgment, by attempting to try the same right in a different way.

2. Where the pendency of another action, and a judgment therein which disposes of the subject matter of the controversy in the new suit, is not regularly pleaded, but is taken advantage of by an exception, the informality is such that this Court will not pass on the question, but will remand the case, that the fact may be regularly ascertained.

3. The Supreme Court has the power, in a proper case, to remand causes, to the end that proper amendments may be made, or further proceedings taken in the Court below.

4. Where the title to a tract of land has been passed upon in one action, the losing party cannot re-open the question by a proceeding to have the land processioned.

(*Holley* v. *Holley*, 94 N. C., 96; referred to).

PROCEEDING to procession land, heard on appeal from the clerk, by *Connor*, *Judge*, at Fall Term, 1885, of BERTIE Superior Court.

The appellant brought this proceeding on the 30th day of October, 1884, to have the tract of land described in the record processioned, as allowed by the statute, (*The Code*, §§ 1926, 1927, 1928).

The processioner and freeholders made report of their action, to which the appellee filed numerous exceptions.

These exceptions were overruled by the clerk of the Court, and he confirmed the report. On appeal, the Judge reversed the order of the clerk, sustained the exceptions, and set the report aside. Thereupon, the petitioner appealed to this Court.

Messrs. C. M. Busbee and *R. B. Peebles*, for the plaintiff.
Mr. John Gatling, for the defendants.

MERRIMON, J., (after stating the facts). It would seem that the present proceeding was unnecessary, if not improper, as it appears from the eighth exception of the appellee, that at and before it began, the present appellant had begun an action against the appellee to try the title to the land in question. In that exception, it is alleged, "that the lands described in the petition in this case, are the same lands described in the complaint in the case of Thos. D. Holley against Geo. Gaskins and Sallie D. Holley, brought by the said Thos. D. Holley at the Fall Term, 1883, of Bertie Superior Court, and tried upon issues joined between the parties, at January Special Term, 1884, of said Court, and carried by appeal by the said Thos. D. Holley to the Supreme Court of North Carolina, from a verdict and judgment against him, in which Court it is now pending. The defendant Sallie D. Holley submits, that the plaintiff has no right in law to have the said land processioned while her suit upon said land to try the title and possession thereof is pending, and that the processioner and commissioners had no right to procession the same, pending the said cause, and their report in that behalf is inoperative and void."

It is suggested to us by affidavit, that the judgment in the action mentioned in the above recited exception has been affirmed in this Court, and that it embraces and settles the matter in controversy in the proceeding. See *Holley* v. *Holley*, 94 N. C., 96. If this is true, the judgment ought to conclude the parties here, indeed everywhere. It is not only unnecessary and unseemly, but absurd as well, to settle the rights of parties in one litigation by solemn judgment, and allow them to litigate the same rights in a subsequent one, in a different form and perhaps in a different way. In the orderly course of procedure, this cannot be allowed. Par-

ties have no right to contest their respective claims indefinitely. If this were so, nothing would ever be determined by Courts of justice. Rights regularly settled in an action, ought to so remain perpetually, and will, unless there shall be some misadventure or improper interference with the course of justice.

It seems, that the appellee intended, by the exception above referred to, to plead informally the pendency of the action mentioned therein, and it may be that the judgment appealed from in this case, was founded upon the pendency of that action, but that it was, does not satisfactorily appear. This exception is so informal and the facts so imperfectly found that we cannot so determine.

As we cannot, we deem it proper, with a view to justice and consistency in procedure, to remand the case, to the end that the Court below may allow the appellee, upon such terms as may be just, to amend her pleadings, if she shall be so advised, by pleading the judgment in the action mentioned and referred to in the eighth exception recited above. This course cannot unduly prejudice the appellant, because, if the matter here in controversy has been settled in the former action as suggested, then he ought to be concluded; if not, then he can have the benefit of this proceeding accordingly as his rights appear to be.

The statute (*The Code*, §965,) contemplates that cases may be thus remanded with a view to justice. It provides that * * * * "the Court may remand the case to the intent that amendments may be made; further testimony taken; and other proceedings had in the Court below." And the case being remanded, the Superior Court has authority to allow all proper amendments. The statute (*The Code*, §277,) expressly confers ample power on it for such purpose.

Let this case be remanded, and a copy of this opinion be certified to the Superior Court, to the end that further action may be taken there according to law. *It is so ordered.*

Remanded.

W. J. HARRIS et al. v. THOMAS WOODARD.

Chattel Mortgage—Evidence—Notice—Conditional Sale.

1. Where the property conveyed in a mortgage was described as "one bay mule," when in fact it was a black mule, the property in the black mule will pass, if it is admitted or proved that the mule in controversy was the one really intended to be covered by the mortgage.
2. Whenever it becomes nesessary to identify the property conveyed in a mortgage from property of a similar kind, or to show what was intended to be conveyed, parol evidence is admissible.
3. Where the title to property is retained until the purchase money is paid, no title to the property passes, although the description of the chattel in the instrument containing the agreement for the conditional sale is wrong.
4. Where a party sold a mule, and retained title until the purchase money was paid, and afterwards took a mortgage on the same mule, and both in the sale note which recited that the title was retained, and in the mortgage, the mule was incorrectly described as a bay mule, when in fact it was a black one, and the mortgagor afterwards sold the mule, which was purchased from his vendee by the defendant: *It was held*, that the defendant, although acting in good faith, and in ignorance of the fact that it did not belong to his vendor, got no title.

(*Hall* v. *Younts*, 87 N. C., 291; *Goff* v. *Pope*, 83 N. C., 127; cited and approved).

This was a CIVIL ACTION, tried before *Philips, Judge*, at Spring Term, 1886, of WILSON Superior Court.

The plaintiff alleged that on the 23d of February, 1880, one B. H. Tyson contracted to sell to one Silas Lassiter a certain mule, for which Lassiter executed a note, of which the following is a copy:

"Nine months after date, I promise to pay to the order of B. H. Tyson, the sum of $115, with interest at 8 per cent., for one bay mule; said mule to be its security, the title of

said mule to remain in said Tyson until said purchase money is paid. February 23d, 1880.

(Signed) SILAS LASSITER, [Seal.]

Thereupon, Lassiter took possession of the mule, and immediately thereafter Tyson transferred the note to the plaintiff for value, and no part of it has been paid. That some time in October, 1883, one Pharaoh Lassiter sold the mule to the defendant, without the knowledge and consent of the plaintiff, and that there has been a demand and refusal. So much of the answer as is material, denies the allegations of the complaint, but admits the purchase of a mule from Lassiter, which he says is a *black* mule, but that "it is not the absolute, qualified or partial property of the plaintiff." The case was referred to A. G. Brooks, who reported the facts as follows:

"1. On February 23, 1880, B. H. Tyson made a conditional sale to Silas Lassiter of a dark bay mule, (taking the paper writing set out above).

"2. Thereafter, Tyson transferred the said note for value to the plaintiff in this action.

"3. Subsequently to said transfer, the note being still unpaid, the plaintiff took from Silas Lassiter and his son Pharaoh, (who then, and during the period covered by the hereinafter recited facts, was living and farming with his father), a mortgage for existing indebtedness and to secure payment for agricultural supplies, on crops raised by them on the plaintiff's land, and on other personal property, including the mule aforesaid, and therein described as a bay horse mule; which mortgage was shortly afterwards, and prior to the purchase by the defendant, duly recorded in Wilson county, wherein all said parties resided and all said property was situate; that the indebtedness described in the mortgage did not include the note given for the purchase money of said mule.

"4. Said mule was incorrectly described, both in said note and said mortgage; in that, whereas said mule was in fact a black mule, it was described as a bay mule.

"5. About the fall of 1883, and after the registration of the mortgage, the defendant, being ignorant in point of fact of the existence of said mortgage or of the plaintiff's claim to the mule, gave to said Pharaoh Lassiter, (then in the actual possession of the mule), in exchange therefor, a certain horse and $30 in money, and took the mule into his possession as his property, honestly believing that said Pharaoh was the owner of the mule and had full power to convey a good and unencumbered title to the same.

"6. After said exchange, the said Pharaoh carried the horse to his home, where he and his father, Silas Lassiter, lived; and said Silas, being fully apprised of the exchange, suffered the horse to be kept and used on his farm until the animal's death, without any offer or attempt to return it to the defendant.

"7. The plaintiff, on being informed of said exchange several days after its consummation, demanded the mule of the defendant, expressly basing his claim upon the said mortgage; and, upon defendant's refusal to rescind said trade, began proceedings in claim and delivery auxiliary to this action, in which he again asserted his title to be that of mortgagee, first asserting a title under said conditional sale upon the trial before the referee.

"8. After said exchange, the defendant, honestly believing himself to be the legal owner of the mule, disposed of the same to third parties, by whom successive trades have been made, so that the mule cannot now be found and produced to abide the result of this action.

"9. The value of the mule is $125, and the annual value of its use and services is $25.

"10. The mule which defendant received in exchange from Pharaoh Lassiter was a black mule and not a bay mule."

By an amendment in the cause, Tyson was made a party plaintiff. Upon these facts, the referee, who had evidently given the matter an intelligent consideration, decided as a conclusion of law, that the plaintiff was not entitled to recover, because: 1st. The incorrect description of the color of the mule in the mortgage to the plaintiff, prevented its conveying or imparting to the defendant constructive notice of plaintiff's title; 2d. The taking of the mortgage superseded, as to third parties, including the defendant, the plaintiff's claim under the conditional sale; 3d. The plaintiff having based his present action on his claim as mortgagee, cannot succeed in his claim as holder of the note of Tyson; 4th. The action of Silas Lassiter, in retaining the horse on his farm, was a ratification of the exchange made by his son, and made the defendant a purchaser of the mule from the mortgagor. The Court overruled the referee's conclusions of law, and gave judgment for the plaintiff, from which the defendant appealed.

Mr. F. A. Woodard, for the plaintiffs.
Mr. Hugh F. Murray, for the defendant.

DAVIS, J., (after stating the facts). It is conceded that the mule described in the note and in the mortgage is the mule claimed by the defendant, and the subject of this action. The question presented is: Did the plaintiff, whether claiming as mortgagee, or as the equitable owner of the legal title, retained by the legal vendor, (which passed to him with the assignment of the note,) lose his right to have the mule subjected to the payment of his debt, by reason of the misdescription, or incorrect description, contained both in the note and in the mortgage?

The answer is not free from difficulty, but after careful consideration, we are of opinion that he does not. In *Hall* v. *Younts*, 87 N. C, 291, the horse sued for was described as

"a dark chestnut horse," and in the mortgage as "a black horse," and when it was proposed to put the mortgage in evidence, it was objected to because of this discrepancy in the description, and the Judge was requested to charge the jury, that there was no evidence that the horse sued for was the one conveyed in the mortgage. The Court held differently, and admitted the mortgage. The identity of the horse was a question of fact for the jury, and as it was admitted in that case that the horse mentioned in the complaint was the same as that mentioned in the mortgage, (though described differently,) the evidence in regard to the identity was needless. Whenever it becomes necessary to identify the property conveyed in a mortgage from property of a similar kind, or to show what was intended to be conveyed, extrinsic and parol evidence is admissible. Herman on Chat. Mort., §39. In *Goff* v. *Pope*, 83 N. C., 127, the Chief Justice said: "The identity of an assigned article of property, and the means of ascertaining it, are largely dependent upon extrinsic proofs, of the force and sufficiency of which the jury must judge." The intention of the parties will not be defeated by a false description of the thing conveyed. In this case, the mule, though incorrectly described both in the note and the mortgage, is the identical mule, as the fact is found, claimed by the defendant.

Under the conditional sale, the title to the mule did not pass to Silas Lassiter until he had paid for it, and the description contained in the note, whether accurate or inaccurate, could not mislead him, or protect any one claiming under him, nor could the misdescription contained in the mortgage protect him, for he purchased of Pharaoh Lassiter, who had no title at all. It becomes immaterial in this case, to consider whether the plaintiff is entitled to recover on his mortgage or on his equitable title acquired by the assignment of the note by Tyson.

As against Lassiter, or any one claiming under him, his title is good, whether by the one way or the other. It was the defendant's misfortune to purchase from one who had no title, and the well known maxim, *caveat emptor*, applies, and this disposes of the 1st, 2d and 3d ground upon which the defendant based his right to hold the mule.

But 4th, Pharaoh Lassiter exchanged the mule with the defendant for a horse, which he carried home, and "Silas Lassiter, having fully approved of the exchange, suffered the horse to be kept and used on his farm until the animal's death, without any offer or attempt to return it to the defendant," and the defendant insists that this "was a ratification of the exchange effected by his son, and made him a purchaser of the mule for value, of the mortgagor." The son had no title and the father had none, and the ratification by the latter of the worthless title of the former added nothing to its value. The plaintiff never ratified it, but "on being informed of the exchange several days after its consummation, demanded the mule," and on refusal, instituted this action.

The judgment of the Court below was for the plaintiff, and this is affirmed. Let this be certified.

No error. Affirmed.

O. M. MAYO v. J. W. LEGGETT.

Certiorari—Appeal—Estoppel—Possession—Notice.

1. A *certiorari* will not be granted to correct the statement of the case on appeal as made up by the Judge, unless it is suggested that an unintentional mistake has been made, when the case may be remanded, or a *certiorari* granted, in order to give the Judge an opportunity, if he thinks proper, to correct the case.

2. Where the true owner of property holds out another as the owner, or allows a third party to appear to have the full power to dispose of it, and innocent third parties are thus led into dealing with such apparent owner, the real owner will be estopped, and the innocent purchaser protected, but in order for the estoppel to arise, the purchaser must have been misled by the owner.

3. Actual possession of land is notice to the world of any equity of the occupant.

4. Land was conveyed to a trustee to secure debts, and afterwards a third party took a conveyance of the equity of redemption and paid off the debts, and then sold the land to a person who took possession. The vendor then caused the trustee to sell the land under the terms of the deed, in order to get the legal title out of him: *It was held*, that a purchaser at such sale, with full notice of the facts, got no title, and no estoppel arose against the owner of the equity.

(*State* v. *Gay*, 94 N. C., 822; *State* v. *Miller*, Ibid., 902; *Ware* v. *Nisbet*, 92 N. C., 202; *Currie* v. *Clark*, 90 N. C., 17; *McDaniel* v. *King*, 89 N. C., 29; *Holmes* v. *Crowell*, 73 N. C., 613; *Melvin* v. *Bullard*, 82 N. C., 34; *Stith* v. *Lookabill*, 76 N. C., 467; *Isler* v. *Koonce*, 81 N. C., 378; *Walker* v. *Mebane*, 90 N. C., 259; cited and approved).

This was an ACTION for the recovery of land, tried before *Philips, Judge*, at Spring Term, 1886, of the Superior Court of the county of MARTIN.

A trial by jury was waived, and the facts found by the Judge are substantially as follows:

On the 18th of December, 1877, Thomas Jones was the owner of the land in controversy, and on that day conveyed the same by deed of trust to Joseph T. Waldo, to secure the payment of certain debts therein named to J. W. Sherrod and W. L. Sherrod, partners, with authority to sell upon their request. Thomas Jones died in 1880, leaving a will, which was duly proved, and by which he devises to his son, W. P. Jones, the land conveyed in the deed to Waldo.

On the 1st of April, 1880, W. P. Jones conveyed his equity of redemption in said land to J. D. Biggs & Co., for certain considerations mentioned in the conveyance, one of which was that J. D. Biggs & Co. should pay off and discharge the

notes to Sherrod & Bro. secured by the deed to Waldo. Immediately after the purchase by J. D. Biggs & Co., they obtained from J. W. Sherrod & Bro. indulgence upon the debts secured by the trust deed, till the 14th of October, 1880, when they paid the said debts and interest, and took from Sherrod & Bro. an assignment of the notes for value, by an endorsement, without recourse. At the time, J. D. Biggs & Co. intended a payment and discharge of said notes, and charged the sum paid Sherrod & Bro. and other sums paid by them, against the Thomas Jones land, in an account which they opened upon their books, and thereafter and until the trial, kept the said notes among their deeds connected with the Jones land, and not among their credits. On the first day of January, 1881, J. D. Biggs & Co., for the consideration of $3,250, conveyed to the defendant the land in controversy, who at once entered into actual possession, and so remained till the trial. On the ..... day of November, 1884, the trustee, Waldo, upon the written request of J. D. Biggs & Co., offered the land for sale at the court-house door in the town of Williamston, for cash, after thirty days' notice. The sale was advertised without the knowledge or consent of the defendant, who was not present and had no notice of the sale, but with the knowledge and consent of J. D. Biggs & Co. Before the bidding began, J. D. Biggs & Co. explained to the by-standers, plaintiff being present, that they had paid the notes secured by the trust, and had sold and conveyed the land to the defendant; that the sale was made only to get the legal title out of the trustee; and while the bidding was in progress, they made the same explanation to the plaintiff. The plaintiff purchased the land at $5,000, and about thirty days after the sale, paid the purchase money to the trustee and took a deed. After the sale and before the payment of the purchase money, J. D. Biggs & Co. explained again to the plaintiff the matter as above stated. About twelve months after the purchase of the land by the defend-

ant, he met Biggs and told him that he understood that the legal title was in the trustee, and he "wanted it out." Biggs subsequently saw the trustee, Waldo, and told him that he had taken in the Sherrod notes, and had sold the land to the defendant, and that he had concluded to sell it to get the legal title out of him. Waldo told Biggs, "that was the way to get the legal title out of him."

On the day after the purchase of the land by the plaintiff, the defendant met him, having heard that the land was sold on the day before, and said he supposed that the plaintiff had bought him out; that Biggs had the land sold to strengthen his title, and he hoped he and Biggs would fix it up.

Plaintiff consulted counsel, paid the money and took a deed; the trustee tendered the proceeds of the sale, less $250 retained for commissions, to J. D. Biggs & Co., which they refused to accept, on the ground that the sale passed no title; whereupon, the trustee returned the money, less the commissions, to the plaintiff, taking his note with surety thereto, to be paid when called for.

Upon the facts, judgment was rendered for the defendant, and plaintiff appealed.

Messrs. W. B. Rodman, Jr., and *E. R. Stamps*, for the plaintiff.

Mr. Jas. E. Moore, for the defendant.

DAVIS, J., (after stating the facts). A motion was made in this Court in behalf of the plaintiff, based upon affidavits alleging errors in the finding of facts as stated by his Honor in the case sent up, for a writ of *certiorari* to have the finding of facts corrected in the several particulars mentioned in the affidavits. The motion is disallowed. When counsel cannot agree, the case as made up by the Judge "must be accepted as conclusively true, and the utmost which this

Court can do, upon the suggestion that an unintentional omission or mistake has occurred, is to remand the cause, or award the *certiorari* to give the Judge an opportunity, if *he thinks proper*, to make a correction." *State* v. *Gay*, 94 N. C., 822; *State* v *Miller*, Ibid., 902; *Ware* v. *Nisbet*, 92 N. C., 202; *Currie* v. *Clark*, 90 N. C., 17; *McDaniel* v. *King*, 89 N. C., 29.

There is no suggestion that the Judge will probably make any corrections in this case; on the contrary, the correspondence set out in one of the affidavits, renders it quite certain that he will not, for he says, "I found the facts from the proofs," and in substance, that he cannot change them without consent.

The appeal can only be tried in this Court upon the case as settled by his Honor.

It was insisted for the plaintiff, that the defendant was estopped by his conduct, and could not assert any right to the land as against the plaintiff, and this was the only point relied on in this Court. In Bigelow on Estoppel, page 479, relied on by the plaintiff, the rule is stated to be, "that where one, by his word or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." This is well settled, and it is added on the same page, that "where the true owner of property holds out, or allows another to appear as the owner of, or as having the full power of disposition, and innocent third parties are thus led into dealing with such apparent owners, they will be protected." In such a case, the real owner is estopped from disputing the title of one who has been misled by his conduct; but that is not the case before the Court. We are unable to see, from the facts found, a single act or word of Leggett's, intended or calculated to mislead the plaintiff, or

that could mislead him. *Holmes* v. *Crowell*, 73 N. C., 613; *Melvin* v. *Bullard*, 82 N. C., 34.

The defendant was in *actual* possession of the land, and this was notice to the plaintiff of his equity—this is well settled. But in addition to the notice which the possession of the defendant gave, the plaintiff was fully advised by Biggs that the notes secured by the trust had been paid off, that the land had been sold to Leggett, and that the only purpose of the sale was "to get the legal title out of the trustee." There was nothing in what the defendant said to the plaintiff the day after the sale, that could be construed as an abandonment of his rights, or as a ratification of the purchase by the plaintiff; on the contrary, he told the plaintiff that "Biggs had the land sold to strengthen his title, and he hoped he and Biggs would fix it up."

In *Stith* v. *Lookabill*, 76 N. C., 467, READE, J., puts this case: "Land is conveyed to A in trust for B. A has the legal title, and conveys to C. B has the equitable title, and conveys to D. Who is entitled to hold the land in this case, C or D?" The answer is "very clearly D."

Waldo has the legal title and sells to Mayo; Biggs & Co. have the equitable title and sell to Leggett; clearly Leggett is entitled to hold.

This is well settled. Washbourn on Real Property, chapter 16, §§9 and 10; Jones on Mortgages, §§973 and 1799; *Isler* v. *Koonce*, 81 N. C., 378; *Walker* v. *Mebane*, 90 N. C., 259. The debts secured by the trust had been paid, and Mayo had knowledge of the fact, and the Court, instead of leaving the equitable owner to his remedy by action to redeem, will set aside the sale. This (says Jones, §1799,) is the rule in the English Courts, and some of the Courts of our States. Certainly, the debts having been paid, the legal title in Waldo or Mayo is but the shell, and the equitable title in Leggett is the substance.

There is no error. Let this be certified.

No error. Affirmed.

ANDREW SYME, Adm'r, v. ZILPHIA TRICE et als.

Irregular Judgment—Motion in the Cause—Judicial Sale.

1. It is well settled, that a motion in the cause, and not a new action, is the proper remedy to set aside an irregular judgment, whether the irregularity appears on the face of the record or not, even although the action is at an end. It is otherwise when it is sought to attack a judgment for fraud, which must be done by a new action, if the action in which the judgment sought to be attacked is at an end.
2. Where an adult was served with process in a cause, but filed no answer, and made no objection to any of the orders and decrees until three and a half years after they were passed, and then showed no injury to have resulted to her from the decrees; *It was held*, that they would not be set aside at her instance.
3. A judgment against an infant who has been served with process is not void, but at most is only irregular and voidable.
4. The Court will not set aside an irregular judgment against an infant as of course, and it will not do so, when it appears from the record or otherwise, that the infant suffered no substantial wrong, and the rights of third parties, without notice, have intervened.

(*Keaton* v. *Banks*, 10 Ired., 381: *Vass* v. *Building Ass'n*, 91 N. C., 55; *Williamson* v. *Hartman*, 92 N. C., 236; *Fowler* v. *Poor*, 93 N. C., 466: *England* v. *Garner*, 90 N. C., 197: *Turner* v. *Douglas*, 72 N. C., 127: *Morriss* v. *Gentry*, 89 N. C., 248; *Hare* v. *Holloman*, 94 N. C., 14; cited and approved).

MOTION in the cause to set aside a judgment, heard before *Graves, Judge*, on appeal from the clerk, at February Term, 1885, of WAKE Superior Court.

The plaintiff is the administrator of George W. Trice, who died intestate in the county of Wake before 1879. As such administrator, he brought a Special Proceeding in the Superior Court of that county, to obtain a license to sell land of his intestate to make assets to pay debts, &c.; and made Zilphia Trice, the sole heir at law of his intestate, party defendant thereto. She, having filed her answer in that proceeding, died, and thereupon the clerk made an order

directing that her heirs at law, Martha Williams, (now Martha Burgess,) Joseph J. Williams, and others, some of them infants under the age of twenty-one years, parties defendant, and to that end a summons was issued on the 27th day of August, 1880.

The summons was served upon the said Martha Williams and Joseph J. Williams, but they filed no answer, and it now appears that the said Joseph J. was an infant at the time of such service upon him, but it did not appear from the summons or otherwise, that he was an infant at the time of service of the same upon him. No amended complaint was filed by the plaintiff after the new parties were brought in. On the 9th day of November, 1880, a judgment, purporting to be entered by consent of all the parties, was entered, directing a sale of the land, and it was afterwards sold on the 31st day of December, 1880, the creditors of the intestate becoming the purchasers; and on the 17th of January, 1881, the sale was confirmed, and a final judgment was entered directing title to be made to the purchasers, &c.

On the 18th day of September, 1884, the said Martha Williams (now Burgess,) and Jos J. Williams moved in the proceeding, to set aside the judgment ordering the sale mentioned, the judgment of confirmation thereof, and all orders in the proceeding affecting them adversely, because of alleged irregularity.

It is not alleged, nor does it appear that the land ought not to have been sold to make assets; that the sale was unfair or fraudulent, or that it did not sell for a fair price. The appellants simply insist, that the proceeding and the judgment and orders therein were irregular, and therefore these motions should be allowed. The motion was made before the clerk, acting as the Court. He denied the motion, and upon appeal the Judge affirmed the order denying the

motion. Thereupon, the makers of the motion excepted, and appealed to this Court.

Messrs. T. M. Argo and *R. H. Battle*, for the plaintiff.
Mr. John Devereux, Jr., for the defendants.

MERRIMON, J., (after stating the facts). The counsel for the appellees insisted on the argument before us, that the special proceeding having been determined—completely ended—a motion could not be made in the proceeding to set the judgment aside for irregularity, and that the proper and only remedy in such case must be by a new and independent action. This is a misapprehension of the law. It is well settled practice to move in the action or proceeding to set aside a judgment in it, made because of irregularity, and this is so, whether the irregularity appears upon the face of the record or not. It is otherwise, however, when the judgment is attacked for fraud. This must be done by a new action, if the action in which the judgment complained of was granted is at an end. *Keaton* v. *Banks*, 10 Ired., 381; *Vass* v. *Building Association*, 91 N. C., 55; *Williamson* v. *Hartman*, 92 N. C., 236; *Fowler* v. *Poor*, 93 N. C., 466. Upon what ground the Court denied the motion of the appellants, does not appear. Grounds of error are not assigned with precision. Particularly, it does not appear that it held that a remedy could not be had by a motion in the proceeding. It must, therefore, be taken that the motion was disposed of upon its merits, and so accepting the fact to be, we concur in the order denying it.

The appellant Martha Burgess was of age, and in pursuance of the order of the Court, duly served with process. The Court thereupon obtained jurisdiction of her—she was before it, cognizant of all that was done in the course of the proceeding, including the orders and judgments complained of—allowed the land to be sold—the sale to be confirmed,

and made no objection until after the lapse of more than three and a half years, and at last, she does not allege that she has suffered substantial, or indeed any injury. Most clearly her motion appears to be without merit.

Nor ought the motion as to Joseph J. Williams to be allowed. It did not appear that he was an infant at the time he was made a party to the proceeding and served with process—at that time he was quite a young man, eighteen years of age, and his mother was his co-defendant, served with process, and ought to have cared for his interests. That he was an infant served with process, did not render the judgment as to him void; at most it was only irregular and voidable. *England* v. *Garner*, 90 N. C., 197; and the cases there cited; *Turner* v. *Douglas*, 72 N. C., 127. While the Court will always be careful of the rights of infants, it will not, in all cases, set aside irregular judgments against them as of course; it will not do so where it appears from the record, or otherwise, that the infant suffered no substantial injustice, especially it will not when the rights of third parties without notice have supervened. *Morriss* v. *Gentry*, 89 N. C., 248; *Williamson* v. *Hartman*, *supra*; *Hare* v. *Holloman*, 94 N. C., 14. That there were other infant defendants that might have made like motions in the proceeding mentioned, cannot help the applicants. So far as appears, they had no authority to represent their co-defendants, and besides, the counsel of the latter withdrew his motion and all objection in their behalf.

No error appears, and the judgment must be affirmed.

No error. Affirmed.

T. C. OAKLEY v. C. M. VAN NOPPEN.

Homestead.

Although the real property of a judgment debtor is incapable of division, and although it would be more advantageous to creditors to have it sold, the Court has no power to order a sale of the land, and a payment to the debtor of one thousand dollars in money in *lieu* of his homestead.

(*Campbell* v. *White*, 95 N. C., 491; cited and approved).

EXCEPTIONS to the report of assessors appointed to allot the homestead, heard before *Connor, Judge,* at Fall Term, 1886, of DURHAM Superior Court.

On execution issued upon a judgment recovered by the plaintiff, the sheriff caused the homestead exemption of the defendant to be valued and laid off to him as prescribed by law, and return thereof made to the clerk of the Superior Court with said execution. The plaintiff filed several objections to the report of the appraisers of their action in the premises, among which is the following, numbered 4 in the series: "That the value of said house and lot, (from which the homestead was set apart,) undivided, is $2,500, the value of the house alone being $1,500; that the house and lot, (as plaintiff believes,) if sold together, will bring such sum as is amply sufficient to pay off the judgment of the plaintiff and pay the defendant the sum of $1,000, with which he can purchase such a homestead as the law allows; yet the excess, for the reasons set forth, would not bring at public sale more than $600, to the great loss of the plaintiff; that the plaintiff believes the homestead allotted to the defendant as aforesaid, exceeds in value the homestead allowed by the law of this State."

An issue was accordingly submitted to the jury, who find the land, so set apart as exempt, is worth $1,500.

Thereupon judgment was entered directing a sale of the entire lot, and the payment of the proceeds of sale into the clerk's office, whereof $1,000 should be retained, subject to the further order of the Court, and the residue to be applied to the plaintiff's judgment. From this judgment the defendant appeals.

Mr. John Manning, for the plaintiff.
No counsel for the defendant.

SMITH, C. J., (after stating the facts). There is error in directing a sale. There should have been a re-allotment within the constitutional limits, which are overrun in the first valuation. The present case, with perhaps less reason in support of the order, is governed by the recent case of *Campbell* v. *White*, 95 N. C., 491, of which the Judge must not have known when the decree was made, and adhering to the ruling in that case, we do not propose to review it.

The judgment below must be reversed, that further proceedings be had according to law.

Error. Reversed.

WEISENFIELD & COMPANY v. MCLEAN & LEACH.

Execution—Levy—Lien of—Judge's Charge.

1. An execution is not a lien on the personal property of the judgment debtor as against *bona fide* purchasers from its *teste*, but only from the levy.
2. It would be error in the trial Judge to single out the testimony of one witness, and charge the jury that if they believe the testimony of that witness, they would find in accordance therewith, when there are several witnesses who testify in regard to the same matter.

3. A prayer for instructions, which would involve an expression of opinion by the Judge on the facts of the case, must be refused.

4. Where it was a disputed question in the case whether a mortgagor lived in one county or the other, a prayer for instructions which assumes that he resided in one of the counties, was properly refused.

(*Jackson* v. *Com'rs*, 76 N. C., 282; cited and approved).

CIVIL ACTION, tried before *Boykin*, *Judge*, and a jury, at January Term, 1886, of ROBESON Superior Court.

There was a judgment for the defendants, and the plaintiffs appealed.

The facts fully appear in the opinion.

Mr. Thos. A. McNeill, for the plaintiffs.

Messrs. W. H. Rowland, *McLean* and *Wm. Black*, for the defendants.

DAVIS, J. The plaintiffs allege that they were the owners of certain cotton in the seed, and a matured crop of cotton, ungathered, which they had purchased at a sale under an execution in their favor, against one J. D. Jowers, and offered in evidence transcripts of a judgment in their favor against the said Jowers, rendered July 23d, 1881, and duly docketed in the counties of Richmond and Robeson, also executions on the said judgment from the Superior Court of Robeson county to the sheriff of that county, and the returns thereon; also executions from the Superior Court of Robeson county to the sheriff of Richmond county, and the returns thereon, showing that on the 6th of September, 1881, the sheriff of Richmond county levied the same on the matured growing crop of said Jowers, remaining ungathered in his field in Richmond county, and that by virtue of said execution and levies, the said crop and 1,897 pounds of seed cotton, part of the crop which had been picked out after the levy and before the sale, were sold on the 22d day of September, 1881,

for the price of $21.81, which sum was applied as a credit on said executions. The executions bear *teste* the 10th Monday after the 3d Monday of February, 1881.

D. M. Morrison, a witness for the plaintiffs, testified that he was deputy sheriff of Richmond county, and had the executions in his hand in favor of plaintiffs against Jowers, and made two levies, one on 7,000 or 8,000 pounds of cotton in a barn, and on farming implements, and one a few days after on the matured cotton in the field, and that he afterward sold 1,897 pounds of seed cotton and the said crop, F. M. McNeill being the purchaser for plaintiff; there were between 30,000 and 40,000 pounds of cotton in the field, and he delivered the cotton to McNeill for plaintiffs. * * * McNeill announced that he was agent for the plaintiffs, and the sale under execution was made in the edge of the Jowers field, in Richmond county.

Other witnesses testified as to the sale, quantity of cotton, &c.

John Leach, one of the defendants, was then introduced, and testified that he knew the crop in dispute, and was at the sale; that McLean and Leach had the cotton gathered and used it, and applied it to accounts: they had advanced Jowers between $1,500 and $2,000 worth; before the first levy, they had advanced $800.00 or $1,000.00. Morrison told witness that he was there to levy. * * * * They (defendants) had possession of and were gathering the crop when he (Morrison) came the second time. Jowers had delivered the crop to the defendants before Morrison had been there at all. * * * * The land is in Robeson and Richmond counties. * * * * Defendants were in possession at the time of the sale. Jowers said that they (defendants) were interested in the crop for supplies, and he turned it over to them.

Plaintiffs rested their case, and the defendants offered in evidence two agricultural liens, one for $700.00 and one for

$300.00, dated April 1st, 1881, due October 1st, 1881, and another dated August 11th, 1881, due October 1st, 1881, for $700.00, executed by J D. Jowers, for all crops made. The lien for $300 conveyed the crops raised in Robeson, and the other two, the crops raised in Richmond—the last two were recorded in Richmond only.

The defendant Leach testified that they (defendants) advanced to Jowers, under these liens, between $1,200 and $1,500. The two mortgages on Richmond crops amounted to $1,400, on Robeson crop to $300.

It was announced publicly, before the sale, that the defendants claimed the crop.

Upon cross-examination he said, that up to August 11th, 1881, he had advanced to Jowers $1,171.50; after that time to the 6th September, $177.70. Jowers was living at Shoe Heel in 1881, and had been for three or four years. He announced at the sale, that Jowers had turned over the property to defendants and that they claimed it under liens.

J. D. Jowers, defendant in the execution, testified: That he executed the liens to McLean & Leach; owed them large amounts; turned over the entire crops to them before the levy by Morrison, to make their money; after that, he had no control over the crops; turned them over to them for advancements furnished; did not know at the time what he owed them; did not balance any account; got credit afterwards.

N. A. McLean testified, that he was at the sale representing the defendants; that he forbade the sale, announcing publicly that they claimed the property under liens, and because Jowers had turned it over to them.

John Leach recalled, said they (defendants) shipped the cotton—sold it and gave credit for the cotton for the year; amount of sales, $2,046. Charged Jowers with the expense of gathering the crop. $2,046 worth of cotton was made on the Jowers place.

Four issues were submitted to the jury, the first relating to the partnership of the plaintiffs and not controverted.

2d. Were the plaintiffs the owners of the property described in the complaint on the 22d of September, 1881? Answer—No.

3d. Did defendants wrongfully convert the same, or any part of it? Answer—No.

4th. What damages, if any, have the plaintiffs sustained? Answer—None.

The plaintiffs asked the Court to charge the jury: "That the lien of the execution related to the date of it, the 10th Monday after the 3d Monday in February, 1881, if the jury believe the evidence, and if the jury believe from the testimony, that the property described in the complaint was levied on and sold by the sheriff, and that the plaintiffs became the purchasers, they are entitled to recover, unless before the levy was made, the defendants became and were *bona fide* purchasers of the said property from J. D. Jowers for value."

The Court declined to charge that in this case the lien of the execution related to the teste, but gave the remainder of the prayer. And this constitutes the first ground of exception. In §448 of *The Code*, it is expressly declared that, "no execution against the property of the judgment debtor shall be a lien on the personal property of such debtor, as against any *bona fide* purchaser from him for value, or as against any other execution, except from the levy thereof," and there was no error in refusing the charge, in the terms requested, and in giving it as modified by his Honor.

The second prayer was: "That if the jury believed the testimony of John Leach, one of the defendants, the defendants were not *bona fide* purchasers of the said property, and the plaintiffs are entitled to recover."

This was refused, and is the second ground of exception.

There was no error in refusing this charge. It would be

error to single out the testimony of one witness, when there are others testifying to the same matters, and charge the jury that if they believed that witness, they must find in accordance with his testimony. *Jackson* v. *Commissioners of Greene*, 76 N. C., 282, and the cases there cited.

The third prayer was: "That the lien for $700, April 1st, 1881, is void as to the creditors of J. D. Jowers, because it was recorded in Richmond county, and J. D. Jowers then resided in Robeson county."

This was properly declined, because it involved an expression of opinion as to the facts of the case, and so the third exception cannot be sustained. We need not refer to authorities to maintain the position that, in his charge, the Judge can express no opinion upon the facts.

The fourth ground of exception was the refusal to instruct the jury: "That the lien of $700, August 11th, 1881, which was recorded September 3d, 1881, only purports to convey to secure future advances, and does not secure any advances made before that time, and conferred no title on defendants, except to secure future advances, and that said lien was void as to the creditors of Jowers, and as to plaintiffs, because it was recorded in Richmond county, and the said Jowers resided in Robeson county."

His Honor refused to give the charge in the express words, for the same reason as the third, and because it involved an expression of opinion as to Jowers' residence, but that part of it which related to its being security for future advances alone, was given. There was no error in this of which the plaintiffs can complain.

The fifth ground of exception was the refusal to charge, as requested: "That the lien for $700, dated August 11th, 1881, and which was recorded September 3d, 1881, was void as to creditors until it was recorded, and that if the jury believe the testimony of John Leach, the defendants had only advanced $300.00, and that if the said Jowers trans-

ferred all the property as testified, to secure the said sum, would be fraudulent in law, and the plaintiffs are entitled to recover."

His Honor refused to give this instruction, and charged the jury, that the plaintiffs, claiming as purchasers under execution against Jowers, could only get such an interest as Jowers had, but if the two liens registered in Richmond county were valid and subsisting at the time of the levy and sale, plaintiffs could not recover, if the liens conveyed the crops; that if Jowers was a resident of Robeson county, the liens having been registered in Richmond county alone, were inoperative as against the creditors of Jowers."

To this the plaintiffs excepted. This exception cannot be sustained.

Upon a review of the record, we find no error in the rulings of His Honor, of which the plaintiffs can complain, and the judgment must be affirmed.

No error. Affirmed.

BEDFORD JENKINS et al. v. W. A. JENKINS.

Wills—Probate of—Rule in Shelly's Case.

1. Prior to January 1, 1856, when the Revised Code went into effect, a will which was attested by two witnesses, could be proved in common form by the oath and examination of one of them only. Since that time, it must be proved by at least two of the subscribing witnesses, if living.

2. Where a will only gives the "use" of land to a devisee for life, with remainder to his heirs, the word "use" makes it clear that the devisor only intended to give a life estate to the first taker, and the rule in Shelly's case will not apply.

3. Where land is devised to the devisee for life, and after his death to be equally divided among the heirs of his body, the rule in Shelly's case does not apply and the heirs take as purchasers.

4. So where by will the use of all the balance of the testator's estate, including lands, were devised to the devisee for his natural life, and at his death to be equally divided among the heirs of his body: *It was held*, that the rule in Shelly's case did not apply.

5. The question is left open whether the rule in Shelly's case is abrogated by *The Code*, §1829.

(*University* v. *Blount*, N. C. Term, 13; *Morgan* v. *Bass*, 3 Ired., 245; *Horner* v. *Springs*, 10 Ired., 180; *Marshall* v. *Fisher*, 1 Jones, 111; *Word* v. *Jones*, 5 Ired. Eq., 400; *Mills* v. *Thorne*, 95 N. C., 362; *Ross* v. *Toms*, 4 Dev., 376; cited and approved).

SPECIAL PROCEEDING, heard upon appeal from the clerk of DURHAM Superior Court, by *Gilmer, Judge*, at Chambers, on the 25th of January, 1887.

There was a judgment for the plaintiff, and the defendant appealed.

The facts are fully stated in the opinion.

Mr. John Manning, for the plaintiffs.
Messrs. E. C. Smith and *W. W. Fuller*, for the defendants.

DAVIS, J. The plaintiffs allege that Mary Beasley was the owner of the land in dispute; that she died, leaving a last will and testament, duly executed to pass both her real and personal estate, which was proven at February Term, 1855, of the County Court of Wake, and that by her said will, she devised the said land as follows: "Article 5th. I desire my daughter, Eliza Jane Jenkins, to have the use of all the balance of my estate, including lands, negroes, stock of all kinds, household, etc., during her natural life, and at her death to be equally divided among the heirs of her body." That the said Eliza J. Jenkins died in the month of March, 1886, and the plaintiffs are her children and grandchildren,

and, together with the defendants, her only heirs at law, and entitled to have the said land partitioned among them in the proportions set out in the petition.

The defendant answers, admitting that Mary Beasley executed a paper writing, purporting to be a will, but denies that it was in law a will, or could take effect as such; but without admitting the legality or sufficiency of said paper writing, or that the same, even if good as a will, was ever duly and properly admitted to probate, he admits that the quoted words in the complaint are correctly quoted from said paper.

For a further defence he insists, that Mary Beasley died intestate, and the said land descended to the said Eliza J. Jenkins, her only heir at law, and that the said Eliza, on the 27th day of March, 1868, by a deed duly proved and registered, a copy of which is attached to the answer as a part thereof, sold and conveyed the said land to the defendant in fee.

He further insists, that even if said paper writing, purporting to be a will of Mary Beasley, be held and deemed in law a good and sufficient will, he avers that the effect of the will was to devise the land in fee to Eliza J. Jenkins, who afterwards conveyed the same to him.

The will of Mary Beasley was duly filed and recorded in the book of wills in the proper office in the county of Wake, and a duly certified copy is filed. The signature of Mary Beasley is attested by two witnesses, as follows:

"Signed in the presence of:
HIRAM WITHERSPOON,
SAMUEL GREEN."

And the certificate of the probate is as follows:

"WAKE COUNTY COURT—*February Term*, 1855:

"The foregoing last will and testament of Mary Beasley was exhibited in open Court and propounded for probate, and the due execution thereof proven by the oath of Samuel Green, one of the subscribing witnesses thereto, and ordered to be recorded and filed.

(Signed) THOMAS J. UTLEY, Clerk."

In the argument of counsel for the defendant in this Court, it was insisted:

1st. That it was necessary for the subscribing witnesses to sign in the presence of the testatrix, and it does not appear that they so signed, but only that she signed in their presence.

2d. That the will was not duly proved, in that it was proven only by one witness, and there was no evidence that it was witnessed by the other.

3d. That even if the will was properly executed and duly proved, yet by a proper construction, the title to the land in question vested in Eliza J. Jenkins in fee.

The will in question was admitted to probate prior to the 1st of January, 1856, and is governed by chapter 122, §6, of the Revised Statutes, which authorized the probate in common form, by one subscribing witness, and not by chapter 119, §15, of the Revised Code, which requires that the will shall be proved by at least two of the subscribing witnesses, if living, &c., and which has been the law since the 1st of January, 1856.

What was the construction placed by the Courts on chap. 122, §6, which was the law for more than three quarters of a century prior to 1856?

In the *University* v. *Blount*, N. C. Term Rep., 13, the will purported to be signed by two witnesses, and the probate was in the following words: "The last will and testament of James Hammond was exhibited and proved by the oath

of Joseph Swift, one of the subscribing witnesses: ordered to be recorded." The objection was made, as in this case, that the probate was not sufficient to permit the will to be read as evidence of title.

TAYLOR, C. J., said, in answer to the objection: "When it appears, as in this case, that the will was attested by two witnesses, and the clerk certifies that it was proved by one of them, the proof must *prima facie* be intended to have been such as the law requires. In other words, that the witness by whom it was proved, deposed also, that himself and the other witness subscribed the will in the presence of the testator. * * * Enough appears to give operation to the rule, *omnia presumuntur rite esse acta.*"

In *Morgan* v. *Bass*, 3 Ired., 245, GASTON, J., citing and approving *The University* v. *Blount*, says, "that inasmuch as it appeared on the face of the will that it was attested by two witnesses, and it was certified to have been *proved* before the Court by the oath of one of them, it should be intended *prima facie* that it had been proved, as required in devises of land, that both himself and the other witness had subscribed the will in the presence of the testator."

These decisions are followed in *Horner* v. *Springs*, 10 Ired., 180, and in *Marshall* v. *Fisher*, 1 Jones, 111.

In the former case, the certificate was, "that it was proved in open Court by Henry H. Glover, a subscribing witness, and recorded."

The alleged objection was, that the clerk had not certified that the witness proved the will as required by law to pass real estate, but the Court held it sufficient.

In *Marshall* v. *Fisher*, the entry was: "The will of Roger Bratcher, proved by Henry Sikes; executor Thomas Bratcher qualified: ordered that letters issue." "This entry is very informal, but we think it is sufficient," said PEARSON, J. "*Res judicata pro veritate accepiter*," and we think the probate of the will of Mary Beasley, in view of these decisions, was

sufficient, and this disposes of the 1st and 2d ground of exception taken by the defendant.

But it is contended for the defendant, that, admitting the will of Mary Beasley to have been duly executed and proved, he is still entitled to the land under his purchase from Eliza Jenkins, because, under the rule in Shelly's case, she took a fee in the land which she conveyed to him.

The testatrix gives to her daughter Eliza, "the use" of all the balance of her estate, "including lands, negroes, stock of all kinds, &c., during her natural life, and at her death to be equally divided among the heirs of her body." Only "the use" was given to Eliza for life, and this use was both of real and personal property, which makes it clear that Eliza's interest was restricted to the use of it for life, and that no gift in fee was intended. But the further direction, that at her death it was "to be equally divided," &c., according to the uniform divisions in this State, takes it out of the rule in Shelly's case.

The subject is discussed at length in *Ward* v. *Jones*, 5 Ired. Eq., 400, and the conclusion that the words, "*to be equally divided*," prevent the application of the rule in Shelly's case, and limit the interest of the first taker to an estate for life, has been regarded as the settled law in this State, and we shall content ourselves with a reference to that case, and to the case of *Mills* v. *Thorne*, 95 N. C., 362, and the authorities cited in those cases.

It will be seen upon an examination of the case of *Ross* v. *Toms*, 4 Dev., 376, and the review of it by Judge PEARSON in *Ward* v. *Jones*, that the paramount purpose, manifested in the will of Joshua Skinner, controlled the decision, and it constituted no exception to the law as stated in the authorities herein cited. *The Code*, §1829, declares that: "Any limitation by deed, will or other writing to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appears by the deed or will."

This section was first enacted as a part of the Revised Code, and went into effect on the 1st of January, 1856. As the will of Mary Beasley was proved at February Term, 1855, of the County Court of Wake, it is governed by the law as it then was, and it is not necessary for us to determine now, what force and effect can be given to that section, as effecting an abrogation of the rule in Shelly's case.

There is no error, and the judgment below must be affirmed.

No error. Affirmed.

OTWAY B. DAVIS and wife et als. v. B. L. PERRY, Ext'r, et als.

Descended Lands—Administration of Estates.

1. Creditors of a deceased person have no lien upon his lands, but only the right to have them subjected to the payment of the debts if there shall be a deficiency of the personal assets, and consequently a conveyance made by the heir or devisee within two years after the grant of administration and advertisement for creditors, is not absolutely void, but only subject to be annulled by the contingency of the personal assets proving insufficient.
2. Where a purchaser bought land from a devisee within the two years, and after the death of the purchaser his administrator sold the land to make assets, more than two years after the issuing of letters, &c., upon the estate of the devisor; *It was held*, that a purchaser at the sale to make assets got a good title as against the creditors of the devisor.
3. In such case, the administrator of the purchaser will hold the money received from the sale of the land in *lieu* thereof, and subject to the claims of the creditors of the devisor.
4. Where a devisee or heir at law sells land derived from the devisor or ancestor more than two years after the issuing of letters testamentary, &c., to a *bona fide* purchaser for value and without notice, such purchaser gets a good title against the creditors of the devisor

or ancestor, but the devisee or heir holds the price received for the land in *lieu* thereof, and subject to the claims of such creditors, just as the land would have been.

5. A purchaser from an heir or devisee with notice, although after two years, holds the land subject to the claims of the creditors of the devisor or ancestor.

(*Badger* v. *Daniel*, 79 N. C., 372; cited and approved).

SPECIAL PROCEEDING, heard upon issues joined before the clerk, by *Clark*, *Judge*, at Fall Term, 1886, of CARTERET Superior Court.

It appears that Benjamin L. Perry died on the 25th day of July, 1869, in the county of Carteret, leaving a last will, which was duly proven on the 7th of July, 1870, and on the 26th of the same month, the defendant B. L. Perry and John M. Perry (the latter now deceased,) qualified as executors thereof.

On the 25th of July, 1870, Benjamin L. Perry and John L. Perry, devisees in the will mentioned, purported by deed to convey for a valuable consideration to Isaac Ramsey and Isaac E. Ramsey and their heirs, a part of a lot, situate in the county named, devised to them by that will.

Afterwards, Isaac Ramsey died intestate, and William B. Duncan, administrator of his estate, in pursuance of a judgment of the Superior Court of the county named, on the 26th of August, 1882, sold the undivided half of said land of his intestate for the price of $920.00 to the defendant William F. Dill.

At the Fall Term, 1881, of the same Court, the plaintiffs obtained judgment against the executors named above, for the sum of $4,000, and they have no personal assets of their testator out of which to pay this judgment. The action in which this judgment was obtained, began on the 26th of July, 1876, and continued pending until the judgment was obtained.

The plaintiffs contended that the conveyance of the lot of land devised to B. L. Perry and John M. Perry by the will of Benjamin L. Perry, having been made within two years next after the qualification of the executors of the will, was void as to creditors; and likewise the deed to the defendant Dill, he having purchased, as insisted, with constructive notice of the plaintiffs' rights as creditors of the testator.

The Court gave judgment in favor of the plaintiffs, directing a sale of the land mentioned, except so much thereof as was sold to the defendant Dill by the administrator of Isaac Ramsey.

The plaintiffs excepted, and appealed to this Court.

Mr. M. D'W. Stevenson, (*Mr. Henry R. Bryan* also filed a brief), for the plaintiffs.

Mr. C. R. Thomas, for the defendants.

MERRIMON J., (after stating the facts). The devisees who sold the land in question to Isaac Ramsey, had the title to it by virtue of the devise in the will to them, and their deed operated to convey the title to him. The executors of the will and the creditors had no *lien* upon the land of the testator; they only had the right, in the absence of personal assets of the testator sufficient to pay the debts and costs of administration, to resort to the land to make assets to pay such deficit. Nor, more particularly, had the plaintiffs or the defendant executor any statutory lien, nor lien created by judgment or otherwise, upon the land sold to the appellee Dill.

The statute (*The Code*, §1442,) provides, that a deed thus made, and indeed all like conveyances made by devisees and heirs at law, "within two years from the grant of letters, shall be *void* as to creditors, executors, administrators and collectors" of the deceased debtor. But this does not imply that such conveyances are absolutely void and inoperative at

all events. The contrary appears from the terms, nature, and purpose of the statute. They are only void in any case as to creditors and personal representatives, and as to them, only in case the personal assets are insufficient to pay the debts and costs of administration; they are not void—they never cease to operate as to the parties to them; nor are they void or inoperative as to *bona fide* purchasers for value, and without notice, if made after two years from the grant of letters—indeed, in that case, they are "valid even against creditors." They are never primarily void *ab initio;* they become so only to the extent, and in the cases and contingencies prescribed by the statute; but when the voidness supervenes to the extent indicated, it must prevail per force of the statute; it relates back to the time when the deed or other conveyance first became operative. It seems to us that this is the obvious and necessary interpretation of the statute referred to above.

Then, as there was no lien in favor of the plaintiffs or other creditors or the defendant executor, Isaac Ramsey in his life-time, after the lapse of two years from the grant of letters to the defendant executor, could have conveyed the title—the title unincumbered—of the land in question, to any *bona fide* purchaser, for value, and without notice of the rights of the creditors and of the personal representative to resort to the land to make assets to pay debts and costs of administration, and such conveyance would have been good and valid even as against creditors. This is so, because he had the title, subject while in him, or in any purchaser from him with notice, to be divested in the way indicated above. This was in effect decided in *Badger* v. *Daniel*, 79 N. C., 372. In that case, Mr. Justice RODMAN said: "It is of course conceded, that the sale by Henry Joyner of the lands devised to him, to Whitfield, having been made within two years after the death of Andrew Joyner, was void as to the plain-

tiffs. Whitfield held the land as Henry Joyner did, and sales by Whitfield, *after two years*, passed unincumbered estates to his vendees, Whitfield holding the price paid to him in *lieu* of the land, and subject to its liabilities. Those to whom he sold within two years, held as he did, and if their lands should be taken, they must look to him for redress."

As Isaac Ramsey had the title to the land at the time of his death, it was competent for his administrator, under the direction and with the sanction of the Court, to sell the land for proper purposes, and convey the title unincumbered to the appellee Dill, he being "a *bona fide* purchaser for value and without notice," after the lapse of two years from the grant of letters to the defendant executor. It must be taken that he was such a purchaser—nothing is said, or appears, to the contrary—and the Court below must have so treated him, else it would have given judgment adverse to him.

The argument of the learned counsel of the appellants, proceeds upon the unfounded supposition that the latter had a lien, or "*quasi* lien," upon the land in the possession of Isaac Ramsey; but as we have seen, they had none. On the contrary, he had the title under such circumstances as that he could in his life-time have passed it by his deed to a *bona fide* purchaser, for value, without notice, and after his death, his administrator could, under the direction and with the sanction of the Superior Court, do so for proper purposes.

The administrator would, however, like himself in his life-time would have done, hold the money, the price of the land, in *lieu* of it, and subject to be applied as it might have been if it had not been sold. *Badger* v. *Daniel*, *supra*.

The reason of the statute seems to be, that it would be unjust after the lapse of a reasonable time—two years—from the grant of letters to the personal representative, to render void sales of land by devisees and heirs at law to *bona fide* purchasers for value and without notice of the rights of creditors of

the deceased debtor. Hence in such cases the sale is upheld as valid, and the creditors and personal representatives must look to the devisee or heir, as the case may be, for the money, the price of the land, and not the land itself. This reason applies quite as strongly, when the sale is made in such case by the personal representative, or devisee, or heir at law of the devisee, or heir at law selling. It might—would—often happen, that such sale would be made without notice or apprehension of the rights of the creditors or personal representatives of the first testator or intestate, as the case might be. The judgment must therefore be affirmed.

No error. Affirmed.

JOHN M. FOOTE v. JAMES T. GOOCH.

Fixtures—Mortgage.

1. The term fixtures has a different meaning as applied to different relations, as vendor and vendee, mortgagor and mortgagee, &c., and the right to detach is most favorably applied between landlord and tenant in favor of the tenant.

2. The rule as to what are fixtures is the same between vendor and vendee and mortgagor and mortgagee, and whatever would pass in an absolute sale to a vendee, will pass as a security to a mortgagee.

3. Where a mortgagor left in possession, improves the mortgaged premises after the execution of the mortgage, by the erection of new works and the introduction of new machinery, which are intended to be a permanent annexation to the freehold, he cannot remove such fixtures and thus impair the increased security, and it seems that this rule applies even to trade fixtures.

4. The intent with which the annexation is made to the freehold enters largely into the question of the right to remove, and if the fixture is made for the purpose of permanently improving the freehold, a mortgagor cannot remove it.

(*Bryan* v. *Lawrence*, 5 Jones, 337; *Latham* v. *Blakeley*, 70 N. C., 368; *Bond* v. *Coke*, 71 N. C., 97; *Deal* v. *Palmer*, 72 N. C., 582; *Moore* v. *Valentine*, 77 N. C., 188; cited and approved).

FOOTE *v.* GOOCH.

CIVIL ACTION, tried before *Shepherd, Judge*, at Spring Term, 1886, of HALIFAX Superior Court.

In January, 1877, one Prescott sold and conveyed certain property to the plaintiff, who, on the same day, to secure the purchase money, executed a deed of mortgage to the vendor for the same property, describing it as being in the town of Weldon, "known as the Foundry property, consisting of one wood machine shop, one foundry building, one blacksmith shop, one horse stable, together with all the machinery, tools, flasks, moulds, &c." These were on lands of the Roanoke Navigation Company, held under a lease to be continued at the will of the lessee, he paying a fixed ground and water rent to the company, and had been for thirty years.

The plaintiff remained in possession, and carried on his business operations as before, during which time articles worn out were replaced, and additions made, until the foreclosure of the mortgage under a judicial proceeding, and a sale to the defendant. These were all delivered, with possession of the premises, by the sheriff to the purchaser, under the protest of the plaintiff, who claimed all the property put there after the execution of the mortgage, as his own. The articles claimed, as since added, are set out in detail in a schedule annexed to the complaint, which this action is instituted to recover. By consent, a trial by jury was waived, and the Court passed upon the evidence and found the facts.

The plaintiff testified: All of these things claimed by me were put there after I purchased of and mortgaged to Prescott. I protested against the delivery by the sheriff of this property to Gooch. I claimed it was mine, and not included in the mortgage. I gave the mortgage to Prescott to secure the purchase money. The sheriff put Joseph Gooch in possession for James T. Gooch, and at his request. The articles were all manufactured or purchased by myself.

On cross-examination he testified:

"At the time of the mortgage there were flasks, patterns and tools there, and I added to them afterwards. The flasks, patterns and tools, &c., I claimed, are those I placed there after the mortgage. Flasks are boxes and movable. The machinery I claim, is what I added after the mortgage. The shafting was bolted to the house. When I put them there I expected to pay for the property, and put them there for the use of the property. The bands were put there to stay as long as the shafting. They could be slipped on and off. The band-saw was bolted to the floor and also connected by band: put there to remain and to be used permanently with the property. The lathe was not fastened, but weighed 1200 pounds, and connected by a band with the machinery. It was put there to be used permanently with the shop. The tools were put there to be used in connection with the machinery. The tools were drills, boring-bars, &c., and were not attached to the house. The lathe was worth $200, band-saw $100.

"The following is the schedule of the property claimed:

1 vise	$ 6 00
1 lathe (wood)	50 00
1 counter shafting for same	5 00
2 boxes and 4 bolts	6 00
2 8-inch pulleys	3 00
20 feet 2½-inch belting	1 16
15 feet 2-inch belting	67
Boring machine	40 00
24 bits for same	18 00
Band-saw	100 00
4 saws for same	10 00
14 feet belting	61
Grindstone bits and 5-inch moulding	1 20
One counter shaft	4 00
2 22-inch pulleys	8 00

1 6-inch pulley	$ 1 60
2 hangers and boxing	10 40
38 feet belting	1 55
Counter shaft	6 00
1 12-inch pulley	3 00
1 5-inch pulley	1 25
24 feet belting	1 60
60 feet belting	112 00
6 couplings	30 00
13 inch pulleys	91 50
Counter shaft	12 00
3 hangers	15 00
1 coupling	5 00
3 pulleys	21 00
Belting	6 30
2 boxes, &c.	7 00
Counter to saw	3 00
2 pulleys	7 00
2 hangers	10 00
Saw frame	15 00
Counter	3 00
2 pulleys	7 00
Belting	3 68
Belt	9 16
1 pulley	75 00
1 screw cutter lathe	200 00
1 emery wheel	10 00
Belting for same	80

"All of the property claimed was placed there by me to be used permanently with the foundry property, and to enhance its value. The articles I put in the buildings and claimed by me, could be easily separated by me from those I bought from Prescott. They could not be separated by the sheriff, or others unacquainted with the business. The property

put there by me was mixed indiscriminately with that I bought from Prescott."

The above testimony was admitted to be true, and his Honor so found.

It was further admitted, that the value of the property claimed was correctly set forth item by item in the schedule, and it was agreed that if his Honor should adjudge that the plaintiff was entitled to any of the articles claimed, he should assess their value at the prices named in said schedule, and allow interest thereon by way of damages.

It is admitted that if the property did not pass to Gooch by the deed, it was converted.

His Honor adjudged that the articles set forth in the schedule were fixtures, and did pass to the defendant under the conveyance from the commissioner, and that the plaintiff was not entitled to recover for their value, his Honor finding that said articles were connected with the foundry and buildings, and attached to the same.

To this ruling the plaintiff excepted and appealed from the judgment.

Mr. John A. Moore, for the plaintiff.

Messrs. W. H. Day, R. O. Burton and *Jos. B. Batchelor*, for the defendant.

SMITH, C. J., (after stating the facts). The term fixtures, as designating personal chattels so attached or affixed to the realty as to become part of it, has a different meaning in its application to the relations of different parties as vendor and vendee, representative and devisee or heir, landlord and tenant, the right to detach and remove, being most favorable to the latter. The rule that governs in case of an absolute sale and conveyance is equally applicable to a mortgage, which is but a form of conveyance, and what would pass to

the vendee, as his own absolutely, will pass to the mortgagee as a security. A mortgagor left in possession and use, who improves the premises by the erection of new works, and the introduction of new machinery, as a means of enlarging his operations, and intended to be a permanent annexation to the freehold, is not at liberty to impair the increased security provided for his debt by removing them.

Trade fixtures even, put up for the purpose of carrying on business since the date of the mortgage, were declared by Lord Romily, in *Cuthwick* v. *Swindell*, Law. Rep., 3 Eq., 249, "so far as they are affixed to the freehold, go with it to the mortgagee." The authorities in support of this proposition will be found, and the subject discussed, in Tyler on Fixtures, at page 566, *et seq.*

The intent with which the annexation is made, enters largely into the question of permanency and the right to remove. Upon this point, the plaintiff himself testified that the machinery claimed by him, was "for the use of the property" which he expected to redeem, and the lathe was "to be used permanently with the shop." He adds, that "all the property claimed was placed there by me *to be permanently used with the foundry property, and to enhance its value.*"

The cases in our own reports are in the same line. *Bryan* v. *Lawrence*, 5 Jones, 337; *Latham* v. *Blakely*, 70 N. C., 368; *Bond* v. *Coke*, 71 N. C., 97: *Deal* v. *Palmer*, 72 N. C., 582.

In *Moore* v. *Valentine*, 77 N. C., 188; the vendee continued in possession under his contract, and put up machinery in order to the more successful conduct of mining operations. He was afterwards adjudged a bankrupt, and at the sale by his assignee, the plaintiff became the purchaser of his estate. Delivering the opinion, PEARSON, C. J., says: "When a mortgagor, who is allowed to retain possession, or a vendee under a bond for title is let into possession, makes improvements and erects fixtures, he does so for the purpose of enhancing the value of the property, *and having made this ad-*

dition to the land, (the italics are in the opinion,) he is not at liberty to subtract it, on the ground that by his own default he is not able to get the title."

The test then is the actual attaching or affixing the articles of personalty to the freehold, so that they become parcel of the realty, and these passed to the purchaser at the sale under the mortgage. We cannot undertake to say whether all the articles enumerated in the schedule fulfill the requirements; and as the appellant must show error, we must assume that they do.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

DEFENDANT'S APPEAL.

Where the Court below found as a fact that certain articles were in no way connected with the freehold, it disposes of the question of their being fixtures in this Court.

This was the defendant's appeal in the foregoing case.

Mr. John A. Moore, for the plaintiff.

Messrs. W. H. Day, R. O. Burton and *Jos. B. Batchelor*, for the defendant.

SMITH, C. J. The defendant's appeal is from an alleged erroneous ruling that the articles mentioned in schedule two, more than one hundred in number, were not the property of defendant.

It is found as a fact by the Court, that these "articles were in no way connected with the foundry or buildings, but were patterns or moulds and tools which were movable." This disposes of the question as to their being fixtures, and determines the plaintiff's property therein.

There is no error, and the judgment is affirmed.

No error. Affirmed.

F. R. KNOTT v. H. H. BURWELL, JR.

Appeal—Counter-claim—Libel—Evidence—Mitigation of Damages.

1. Where a demurrer to a counter-claim is sustained and the counter-claim stricken out, the defendant cannot appeal from the judgment and so stop the trial of the action, but must note his exception to the action of the Court and bring the point up for review on an appeal from the final judgment.
2. In action to recover damages for a libel, it is competent for the defendant to introduce evidence in mitigation of damages, to show the provocation which induced him to publish the libel, but this provocation must originate in the same subject matter out of which the libel arose, or be closely connected with it.
3. In actions for defamation under the former system of pleading, evidence offered to sustain a plea of the general issue could not be considered in mitigation of damages, but this has been changed by *The Code*, §266.
4. Malice is presumed from the utterance of false defamatory words, and proof of it, other than proof of the utterance of the false and defamatory words, is not necessary, and hence it is always proper to allow the defendant to prove an absence of malice in order to mitigate the damages.
5. So where the plaintiff had charged the defendant with using false weights in his business, and upon hearing of the charge, the defendant sent to the plaintiff and asked him to correct it, which the plaintiff promised to do, admitting at the time that the charge was false, but he afterwards refused to retract it, upon which refusal the defendant published the libel sued on: *It was held*, that these facts were admissible in evidence in mitigation of damages.

(*Nelson* v. *Evans*, 1 Dev., 9: cited and approved: *Smith* v. *Smith*, 8 Ired., 29; cited).

CIVIL ACTION, tried before *Gilmer*, *Judge*, and a jury, at November Term, 1885, of GRANVILLE Superior Court.

There was a judgment on the verdict for the plaintiff, and the defendant appealed.

The facts fully appear in the opinion.

Messrs. R. W. Winston and *E. C. Smith*, for the plaintiff.
Mr. D. G. Fowle, for the defendant.

SMITH, C. J. The action is for libel, and the complaint in separate counts, sets out the alleged libelous matter, published in a newspaper, known as *The Gold Leaf*, in its respective issues of February 21st and March 6th, 1884. The answer denies the identity of the matter contained in the newspaper with that set out in the complaint, and the imputed motive, and proceeds to explain the circumstances that preceded and led to the publication as a means of self-vindication, and to details other matters in explanation and excuse of the act. It also sets up a counter-claim for damages, on account of slanderous utterances of the plaintiff against the defendant, in connection with the personal differences which had sprung up between them in business operations, and to which those imputed to the defendant have reference. To the counter-claim the plaintiff interposes a demurrer, based upon the ground that it contains a distinct and independent cause of action in tort, unwarranted by *The Code*, §244, par. 1, and this being sustained by the Court and the counter-claim disallowed, the defendant appealed, and at the same time moved the Court to suspend further proceedings in the action, until the appeal could be heard and decided. This was also refused and the trial ordered to go on. To these rulings the defendant's first exception is taken, and it is in our opinion without support in law. The proposed appeal was premature, and the exception being noted upon the record, the ruling would come up for review after the final hearing upon an appeal then taken, and this opportunity is now afforded the defendant.

We pass over so much of the controversy as relates to the form of the issues, all of which are found adversely to the

defendant, to consider the exceptions to the refusal of the Court to admit evidence offered in mitigation of damages under the last issue, since this, in our opinion, entitles the defendant to a new trial.

To the proper understanding of the pertinence and force of the excluded proofs, it is necessary to set out the libelous publications as stated in the complaint, which are as follows:

"TO THE PUBLIC.—On the 13th inst., Mr. J. W. Brown sold with us thirteen lots of tobacco. With the price of five of these lots he was satisfied. The other six lots he took in, and carried to Oxford, where, on the 14th inst., in the warehouse of F. R. Knott & Co., the same tobacco was made to weigh, or reported as weighing, sixty-four pounds more than it weighed at our house. It has now come to my knowledge that Mr. F. R. Knott, since the above mentioned occurrence, has been busying himself trying to slander our business, and our personal integrity, charging us with false weights, and giving the above as witness at once of our false dealing, and his own superior honesty. As soon as I heard of the matter, I sent my partner and brother, Mr. J. S. Burwell, to him, to call his attention to the injury and injustice done us, and to ask for such reparation as we were entitled to. Thereupon, in his (Mr J. S. Burwell's) presence, he agreed to sign a written statement, in which he acknowledged the wrong, and took the blame on his own warehouse, alleging in excuse, that from some unknown cause his scales or trucks were out of order on the 14th, which was not detected by him till after the sale. Having said all that, and allowed it to be written, he then refused to sign it, or to do anything else, and so this falsehood and slander still circulate on his authority. On such authority I can hardly think that any respectable man's character or business can be injured. It is the first time that our weights have been questioned, and I here pronounce the charge knowingly, intentionally and corruptly false. Our

scales are correct, and we render true weights. The false weighing was done in Messrs. Knott & Co.'s warehouse, and done for the purpose of dishonestly and knowingly injuring our warehouse and benefiting himself thereby.

Now, as to Mr. F. R. Knott. By his course since that occasion, he has shown himself insensible to the obligation of truth or honor, and unworthy of notice from any gentleman. I refer by permission to Messrs. John Meadows and I. N. Burwell, as to the incorrectness of his weights of tobacco bought by them on the same day. The gentlemen say that their tobacco was made to weigh about eight pounds to the pile too much on that day, which accounts for the gain of sixty-four pounds in the eight lots sold by Mr. Brown. I have further to say, that this same F. R. Knott has been charged to his face in the city of Richmond with stealing, without resenting the same. We know that we have to make our living by fair dealing and hard work, and have no fear that an honest man will question the one or envy the results of the other. We give true weights, realize the highest prices current, and pay cash for all we sell. And so, conscious of our integrity, we are, and I, H. H. Burwell, Jr., in particular, am at all times to be found at the Carolina Warehouse, in Henderson, ready to see and satisfy all who come, and to give our friends, the farmers, a cordial welcome, and the best the tobacco market affords.

H. H. BURWELL, JR.,

Of Burwell Bros. & Co., Carolina Warehouse, Henderson, N. C.

February 20th, 1884."

And for a second cause of action, plaintiff complains and alleges:

1. That on the 6th day of March, A. D. 1884, the said defendant, still further contriving and wickedly and maliciously intending to injure the plaintiff as aforesaid, and to

bring him into public scandal, infamy and disgrace, and to cause it to be suspected and believed that the plaintiff had been guilty of the crime of larceny, falsely, wickedly and maliciously, did print and publish, and cause and procure to be printed and published, in *The Gold Leaf*, a newspaper printed and published in the town of Henderson, as aforesaid, of and concerning the plaintiff, a certain other false, malicious, scandalous and defamatory libel, in one part of which said libel is contained the malicious, scandalous, defamatory and libelous matter following, that is to say:

"5th and lastly, that said Knott (meaning the plaintiff) had been charged to his face in the city of Richmond, with stealing, and did not resent it," meaning and intending thereby to charge the plaintiff with the crime of larceny, and in another part of said libel is contained the false, scandalous, malicious, defamatory and libelous matter following, that is to say: 'Not wishing to wrong a public at whose hands I (meaning the defendant,) have received so much confidence and support, by too venomous an article, and being unwilling to descend to a low mode of warfare, I (meaning the defendant,) simply offer the following certificate from parties above suspicion, leaving it to a fair and impartial public to judge whether my card (meaning the card of defendant as published in the said *Gold Leaf* of February 20th, 1884, and set out in full in the first cause of action of this complaint,) was justifiable, and whether or not my charges against said F. R. Knott are not more than justified, (meaning thereby the charge of larceny as set forth in said first card of date 20th February, 1884, and meaning and intending thereby to charge the plaintiff with the crime of larceny,) and if I (meaning defendant,) may be pardoned for thus trespassing upon the patience of my friends and the public, I wash my hands of Mr. F. R. Knott.'"

The defendant proposed to show, that four days before the date of the first publication, having received information that he had been charged with falsely under-weighing certain tobacco of one Brown by the plaintiff, the defendant sent his brother to Oxford to see the plaintiff, and to inquire of him if he was not in error in his statement as to the weight of Brown's tobacco, and to get his certificate to that effect; that his brother did visit Oxford, and returned the next day, reporting to defendant that it was a current rumor in Oxford that Knott had charged defendant with false weighing, and he had caught defendant at it; that plaintiff said the mistake was his own in regard to the weight, and he would fix it all right by signing a card to that effect next morning.

A card was prepared and presented to plaintiff as follows:

"TO THE PUBLIC.—It has been currently reported to the detriment of Burwell Bros. & Co., proprietors of The Carolina Warehouse, of Henderson, that a load of tobacco belonging to J. W. Brown, Esq., was sold in their warehouse on the 12th inst., and was taken in and brought to Oxford and sold on our warehouse floor on 14th February, and that the tobacco gained sixty-four pounds in weight. The day the tobacco was sold in our house, our scales or trucks were out of order, from some unknown cause, which was not detected by us until after the sale, and we feel that we would be doing Messrs. Burwell Brothers great injustice were we not to make the facts known to the public."

That the plaintiff Knott refused to sign said card, and would do nothing further.

The rulings of the Court in refusing the proffered evidence, deprive the defendant of the means of showing the provocation given by the plaintiff for the *retaliatory* and vindicating utterance of the words penned, in the form of

an appeal to the public, and deny him the opportunity of showing the facts of the plaintiff's own misconduct, which are set out in the cards. This leaves him with no shadow of excuse for what he uttered in a moment of irritation, and smarting under a sense of injury, and places him under the imputation of being influenced solely by a feeling of malignity toward the plaintiff, and a revengeful spirit excited by no just cause.

It cannot be that the same punitory consequences are to be measured out in the one case as in the other, nor is such the law. It is true, under former technical rules of pleading applicable to actions for defamation, it was held that the general issue did not let in evidence offered to sustain it, to be considered in mitigating damages, as is decided in *Smith* v. *Smith*, 8 Ired., 29; but this has been superseded by the more equitable provision found in *The Code*, §266, which allows in the answer "both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of the damages," and whether the defendant "prove the justification or not, he may give in evidence the mitigating circumstances."

As malice is involved in the utterance of false defamatory words, and separate proof of it is not essential to the maintenance of the action, it is a material element in aggravating damages, and especially so whenever the jury are at liberty to make them exemplary; it is but reasonable to allow the defendant to disprove its presence, and lessen its intensity in reducing the damages. "Even in States where the truth of the words is not permitted in mitigation under the general issue, yet proof tending to show that the plaintiff might be guilty of such acts as are charged, may be given to disprove malice and thus reduce the damages; as that prior to the speaking of the words, a common report or suspicion existed that the plaintiff had committed the act charged," with numerous references in the foot note, found on page 711 of Folkhard's

Starkie on Slander and Libel, from the note which is inserted by the editor, Woods, the extract is taken.

Among the cases cited is that of *Nelson* v. *Evans*, 1 Dev., 9, where it is said, a prevalent general report of the truth of the words spoken may be proved in mitigation, but not in justification.

"In cases of libel," we quote from Wood's Mayne on Damages, §122, "the defendant may give any evidence in reduction of damages which goes to prove the absence of malice, or he may show previous provocation received from the plaintiff." This provocation ought to originate in the same subject matter, or be closely connected with it, out of which the defendant's slander arose. *May* v. *Brown*, 3 B. & C., 113; 10 E. C. L. Rep., 24.

Now, to apply the rule to the facts of the present case: The defendant, in a forbearing spirit, on hearing that a serious charge had been made against him for false weighing, sends his brother to the plaintiff to ascertain from him if he was not in error in his statement about the defendant's short weighing, and to obtain from him a written correction. The interview takes place; the current report, so prejudicial to the defendant, is communicated to the plaintiff, who says it was a mistake of his, and that he would in the morning sign a card to that effect. It was prepared by the editor of another newspaper, and when being presented to the plaintiff he peremptorily refuses to put his name thereto, nor does he suggest any modification in its form, which would be acceptable. This, when repeated to the defendant, was followed very soon by the alleged libel. Ought not these facts to have been heard by the jury; and if accepted as true, ought they not to have been considered in determining the punishment to be suffered by the defendant in giving expression to his resentment in the form adopted? Was it to be expected that he could rest silent under so injurious a charge, and repress all resentment at the plaintiff's refusal of any

correction? Was it without any palliating circumstances that in repelling the charge, he struck back at his assailant?

Certainly one feeling himself so wronged, and with correction refused by the wrong-doer, does not stand in the same light as one who so acts with no provocation and from sheer malignity, and yet the exclusion of the evidence leaves him equally defenceless before the jury as would be the other.

So too, we think, the statement in the depositions, with the information possessed by the defendant, should have been heard by the jury in mitigation, because the evidence shows that the charge about the "nested tobacco" was not a mere fabrication of the defendant, and hence the damages should not be so great as if it was the unsupported creation of the defendant's own brain, and conceived and brought out from a malicious and wicked heart.

For these reasons the verdict must be set aside, and a *venire de novo* awarded in the Superior Court.

Error. Reversed.

THE TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA and C. S. WINSTEAD v. THE STATE NATIONAL BANK OF RALEIGH and R. W. LASSITER.

Conversion—Demand—Statute of Limitations—Trusts.

1. Conversion consists either in the appropriation of the thing to the party's own use; or in its destruction; or in exercising dominion over it in exclusion or defiance of the plaintiff's rights; or in withholding the possession from the plaintiff, under a claim of title, inconsistent with that of the plaintiff, but it must be by *acts*, as bare words will not amount to a conversion.

2. In the case of a conversion by a wrongful taking of the chattel, it is not necessary to prove a demand and refusal; and so the wrongful assumption of the property and of the right of disposing of it, may be a conversion in itself, and render a demand and refusal unnecessary.

3. The statute of limitations will run in favor of one who has converted chattels and applied them to his own use, although the true owner may be ignorant of the conversion.

4. Public securities, such as State bonds, may be converted by retaining them under an assertion of a right to hold them in defiance of the true owner, as well as other property.

5. Where a trust is created by the agreement of the parties, no length of time will bar the *cestui que trust*, for the possession of the trustee cannot be adverse, unless the trustee repudiate the trust by clear and unequivocal acts or words brought to the notice of the *cestui que trust*, but when it is sought to convert a party who has the legal title into a trustee by a decree, he may insist that his possession was adverse, and be protected by the statute of limitations.

6. So where an express trustee conveys the trust property, in breach of the trust, and his grantee continues to hold adversely, the statute will run in his favor.

7. In causes of action, which under the former practice could have been brought in a Court of law or a Court of equity, the Court of equity will be bound by the statute of limitations as much as the Court of law would.

8. Where bonds belonging to a corporation were deposited by its treasurer with the defendant as a security for a personal loan, which deposit was a breach of trust but was not known so to be by the defendant, and afterwards a new treasurer of the corporation upon inquiry, was told by the defendant how it held the bonds, the defendant at the same time claiming a right to hold them until the personal loan made to the former treasurer was paid; *It was held*, that this amounted to a conversion of the bonds, the possession of the defendant was adverse, and the statute of limitations began to run from the conversation with the new treasurer.

(*Glover* v. *Riddick*, 11 Ired., 582; *Carraway* v. *Burbank*, 1 Dev., 306; *Hare* v. *Pearson*, 4 Ired., 76; *Hamilton* v. *Shepperd*, 3 Murph., 115; *Blount* v. *Parker*, 78 N. C., 128; *Brickhouse* v. *Brickhouse*, 11 Ired., 404; *Edwards* v. *University*, 1 Dev. & Bat. Eq., 325; *Taylor* v. *Dawson*, 3 Jones Eq., 86; *Uzzle* v. *Wood*, 1 Ired. Eq., 227; *Taylor* v. *Gooch*, 4 Jones, 436; *Burgin* v. *Lenoir*, 1 Car. Law Rep., 117; cited and approved).

UNIVERSITY *v.* THE BANK.

CIVIL ACTION, tried before *Avery, Judge*, and a jury, at February Civil Term, 1884, of WAKE Superior Court.

There was a judgment for the plaintiffs, and the defendants appealed.

The facts fully appear in the opinion.

Messrs. C. M. Busbee and *E. C. Smith*, for the plaintiffs.

Messrs. Dan'l G. Fowle, John Gatling, and *Geo. V. Strong*, for the defendants.

SMITH, C. J. Robert W. Lassiter, treasurer of the plaintiff, having in custody its funds for safe keeping, deposited with the defendant, the State National Bank, five several bonds of the State, as collateral security for moneys advanced to him, or, as the parties describe the transaction, hypothecated them for that purpose.

Of these bonds, two, numbered 640 and 387, were sold by the Bank on December 8th, 1875, and the three others, numbered 11, 473 and 1854, were in like manner sold, sometime between the 3d day of August and the 14th day of October, 1878, and the proceeds of sales applied according to the conditions of the deposit.

Kemp P. Battle succeeded said Lassiter in office, and on February 24th, 1874, became treasurer and secretary of the University, and continued to be such until June, 1876, when he was elected president, but he still exercised his former functions as treasurer and secretary, until the Fall of 1883.

Soon after his election as treasurer, he demanded from his predecessor in office the books, papers and property belonging to the University, of which the two first mentioned were surrendered, but not the seal nor the public securities.

Having information that three of the State bonds belonging to the land scrip fund, and held by the University under the act of Congress, 12 U. S. Stat. at Large, ch. 130, had been hypothecated with the defendant Bank by Lassiter, he

made inquiry of Williams, its president, when the latter stepped back to the vault, and returned, giving him the numbers 640, 887 and 1854 of the bonds that had thus been deposited with the bank as collateral security. The witness ascertained that two others had been taken from the box in which they were kept, leaving thirty-eight of the forty bonds that belonged there, parcel also of the land scrip fund; he again called on the bank president, and found that those numbered 11 and 473 were also in its possession, having been left there on similar conditions as the others.

In both interviews, which we take it were soon after his appointment to the vacated office, and at least during the year 1874, witness infomed Williams that these securities constituted part of the land scrip fund of the University, and that "Lassiter had no right to hypothecate or to sell them," and he understood that the Bank claimed the possession by reason of the hypothecation. They were not then nor afterwards demanded, nor, so far as the testimony goes, did the Bank indicate any disposition to give them up, except on the terms of such deposit.

For this misapplication of the trust fund, the University brought suit against Lassiter and the sureties on his bond, the summons issued in which was served on the former and the surety Jones, in March, 1876, and on the surety Winstead, one of the present plaintiffs, on May 30th thereafter, and recovered judgment in Wake Superior Court at February Term, 1879, for $4,913.01.

The judgment had been nearly paid when this action was begun on July 30th, 1880, and the residue has been since paid by said Winstead, the only solvent debtor.

Among other defences, not in the view we take of the case necessary to be considered on the appeal, the defendant, in its answer, relies upon the bar interposed by the lapse of time since its liability, if any, was incurred, counting the interval in which the statute was running up to the institu-

tion of the suit, and as against the plaintiff Winstead up to February 23d, 1884, when he filed his amended complaint.

We do not propose to pursue the course of argument of counsel, and discuss, as they have done, with ability and learning, the numerous exceptions taken and points made during the progress of the trial in the Superior Court, since the controversy will be disposed of in considering the preliminary obstacle to the maintenance of the action arising from the delay in bringing it since the right to sue accrued.

If the first misapplication of the funds was without authority and tortious on the part of Lassiter, it would seem not to be less so in the misappropriation to its own use and for the security of the advances made to him on the part of the Bank, for both participate in the tort.

If this use of the fund by Lassiter was rightful, the Bank would not be in fault in retaining possession until the conditions of the hypothecation were met. While making this suggestion, we do not propose to treat the original deposit as *per se* wrongful, since it seems to have had the sanction of the Trustees of the University, but to consider whether the claim made by the Bank, when advised of the want of power in Lassiter to make the disposition of the bonds and that they were the property of the University, to retain them and appropriate the proceeds of their sale for its reimbursement, accompanied with a virtual refusal to restore them, is not a conversion, which instantly exposed them to an action by the owner for their recovery.

"A conversion in the sense of the law of trover," is defined by Mr. Greenleaf in the 2d volume, §642, of his Law of Evidence, as consisting "either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in *withholding the possession from the plaintiff, under a claim of title inconsistent with his own.*"

The correctness of this definition is affirmed by NASH, J., who quotes it almost *in totidem verbis*, in delivering the opinion in *Glover* v. *Riddick*, 11 Ired., 582.

In *Carraway* v. *Burbank*, 1 Dev., 306, the defendant administered on an estate, and took into his possession as among the effects, a horse which the intestate held as bailee, and at the sale he bid in the horse himself. The question was, did this amount to a conversion; and the Court so decided. In his opinion, HENDERSON, J., says: "Conversion is an act of ownership, exercised over the personal chattel of another, inconsistent with the owner's right. It must be an act—bare words will not do." In the same case, TAYLOR, C. J., declares: "If a person purchase another's goods from one having no right to sell them, and takes them into possession, it is assuming upon himself the property and right of disposing of another's goods, and *amounts to a conversion.*"

In *Hare* v. *Pearson*, 4 Ired., 76, DANIEL, J., thus expresses himself on the subject: "The defendant on the day of sale set up a claim to the corn, as his property, but he had shown no title. The plaintiff gave notice to the defendant that he should take away the corn, which he had purchased at the officer's sale. The defendant said that he should not have it, and that he would break every bone in his body before he should carry it away. The Judge charged the jury, that this *was in law a conversion.* * * * We think the charge of his Honor was correct, for a *wrongful dominion and assumption of property in the chattels, is a conversion, and if there be a deprivation of the property by the defendant, it is a conversion.*"

Mr. CHITTY, in his work on Pleading, vol. I., page 153, says, and in this the authorities concur, that "the wrongful taking of the goods of another, who has the right of immediate possession, is of itself a conversion. * * In the case of a conversion by wrongful taking, it is not necessary to prove a demand and refusal. So the wrongful assumption of the

property and right of disposing of goods, may be a *conversion in itself*, and render a demand and refusal unnecessary."

Nor is it material to put the statute in motion, that the exercise of the dominion over the goods, and applying them to the wrong-doer's own use, should be known to the owner. *Hamilton* v. *Shepperd*, 3 Murph., 115; *Blount* v. *Parker*, 78 N. C., 128.

The principle is thus well settled, that the goods of the owner may be converted so as to expose the party to an action, not only by taking an unauthorized possession, but by retaining it under an assertion of right to hold in defiance of such owner, and this may be of public securities as well as of other property. *Brickhouse* v. *Brickhouse*, 11 Ire., 404.

Reverting to the evidence, it is shown that the original deposit and delivery of the bonds to raise money, was an illegal and unwarranted use of them by the officer in whose custody they were placed, though then not known perhaps to the Bank, and when the fact was made known to it, the president claimed the right to hold and apply them according to the terms of the contract, as a collateral security for the loan, and in resistance of the claims of the University, and they were thus subsequently disposed of.

Now, under these circumstances, was a formal demand needed to put the defendant in the wrong, and give the plaintiff a cause of action? The defiant attitude and claim of the Bank, in opposition, was itself a refusal to recognize the plaintiff's right, and with possession, an exercise of dominion over the bonds; and a demand for restitution was substantially denied in advance, and thus dispensed with.

But the plaintiffs' counsel seek to escape from the legal consequences of the long delay, by treating the action as brought by the *cestui que trust* against the depositary as a trustee, calling for an account of the trust fund, to which it is insisted the statute does not apply. The distinction is well marked between trusts expressly created between the

parties, and those declared by the Court, in respect to the operation of the statute of limitations.

We refer to some of the many adjudications in this State pointing out the difference: "In *Edwards* v. *University*, 1 D. & B. Eq., 325, it is settled," remarks PEARSON, J., "upon principle and authority of the cases, that the statute of limitations protects one who has the legal title, and is sought to be converted into a trustee against his consent." *Taylor* v. *Dawson*, 3 Jones Eq., 86.

In a previous case the same learned Judge had thus declared the rule: "Where a trust is not created by agreement of parties, but the person having the legal title is converted by a decree into a trustee on the ground of fraud, he may insist that his possession was adverse, and protect himself under the statute of limitations." *Uzzle* v. *Wood*, 1 Ired. Eq., 227.

And again he says: "The relation between the heirs of Walker and Pannill was that of trustee and *cestui que trust* by agreement of parties. So Pannill's possession for no length of time would divest the title of his trustee, for the simple reason that it could not be adverse." *Taylor* v. *Gooch*, 4 Jones, 436.

The fiduciary may, however, sometimes occupy a hostile relation, and then the statute begins to run. "If a trustee repudiate the trust by clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice of the *cestui que trust*, in such manner that he is called upon to assert his equitable rights, the statute will then begin to run." 2 Hill Trustees, §864.

"When the trustee makes a conveyance of the trust property, in breach of the trust, and his grantee continues to hold adversely, the statute applies." 2 Dan. Ch. Prac., 1735. We cannot perceive how any express trust was created so as to form that relation between the present plaintiff, whose

property has been diverted to the use of its treasurer by his own attempted tortious disposal of it, in disregard of his own obligation, and the defendant, who participates in the act and takes benefit under it. The fund may be pursued and recovered, because the property has not been changed by the hypothecation, and this by action at law as well, if this be a proper case for equitable interposition, as by suit in a Court of Equity. When the remedy is thus open by either mode of proceeding, no matter which is adopted, the statute is equally available as a defence.

In *Burgin* v. *Lenoir*, 1 Car. L. Rep., 117, HALL, J., for the Court, says: "When suits are brought in this Court, over the subject matter of which Courts of common law, as well as this Court, have jurisdiction, this Court will consider itself as much bound by the statute of limitations as a Court of Law. But in cases where it has exclusive jurisdiction, as in all cases of trusts, the statute does not stand in the way," referring to the class of trusts denominated express, in opposition to those created by decree.

As the action would at once lie against the Bank, when, advised of the plaintiff's claim, it retained and exercised dominion over the bonds and disavowed any right in the plaintiff inconsistent with that derived from the hypothecation made by its faithless officer, it seems to us manifest the statute then began, at least, to run its course, for it is the *right to sue, and the failure to sue,* within the prescribed time, that give efficacy to the statute.

The jury find upon issues submitted to them, that Lassiter had no right to hypothecate the bonds, which then, as defendant knew, belonged to the plaintiff, and were held in trust, and that three years did elapse before the cause of action accrued and before suit was brought as to some of the bonds, to-wit, those sold in 1875. The Court refused to give an instruction asked, that the statute was put in motion by what transpired between the president of the Bank and

Treasurer Battle, and in this there was error, for reasons already stated.

We do not understand why the finding of the application of the bar to the claim for the bonds sold in 1875 is disregarded in the giving of final judment for all, but this could be rectified, if it were the only difficulty in the case, by reforming the judgment. We have not deemed it necessary to inquire into the measure of damages, nor to consider other interesting questions debated at the bar, as our opinion upon the defence arising out of the lapse of time, renders it unnecessary.

There is error, and there must be a new trial.

Error. Reversed.

JOHN W. SCOTT v. ELIAS BRYAN.

Parties—Partnership—Pleading—Counter-claim.

1. Where four copartners joined in a note to purchase property for the partnership account, and after the dissolution of the firm, the plaintiff paid more than his proportion of the note, and brought suit against the defendant for contribution; *It was held*, that the other partners were not necessary parties where they were all insolvent, one of them dead with no representative, and another a non-resident of the State.

2. Where one partner pays more than his share towards a partnership debt, he can only recover from his copartner one half of the excess paid.

3. Although a counter-claim to a counter-claim is not allowed, yet when it is pleaded at an early stage of the action, and no objection is made to it, this Court will not strike it out when the action has been long pending, but will consider it as an amendment to the complaint.

SCOTT *v.* BRYAN.

CIVIL ACTION, heard before *Clark, Judge,* upon exceptions to the report of a referee, at May Term, 1886, of CHATHAM Superior Court.

This case, commenced in 1872, and after repeated references and reports, and one appeal to this Court, (73 N. C., 582,) has been protracted, and is now before us for final adjudication, very much narrowed in its scope.

The referee finds to be due the plaintiff, on March 16th, 1874, the sum of $1,307.53, in making up which amount is a charge of $2,000 for a debt belonging to the plaintiff, and used in paying off a judgment recovered by one Harris against the parties to this suit, in the Superior Court of New Hanover. The indebtedness thus reduced to judgment, consisted in three several notes, each for $1,050, made on January 1st, 1857, and payable with interest, at short intervals, and executed under seal by the plaintiff, the defendant and three others, I. S. Banks, L. A. Williams and W. P. Elliott.

The notes were given in purchase of the steamer Enterprise, intended to be run on the joint account of the copartners, on the Cape Fear river, between Wilmington and Lockville. She was so run for a time without profit, and was finally burned and destroyed.

The referee was ordered at Spring Term, 1879, to report the partnership account of the Steam-boat Company, and he reported that there was no such copartnership. Upon defendant's exception, the matter was recommitted, and the referee directed to ascertain whether such copartnership did not in fact exist; and at Spring Term, 1883, he reported that it was formed of the parties to the note in the year 1856 or 1857; and he was then required to take and state the partnership account. The referee failed to carry out the order, in consequence of the defendant's objection, that the other three members of the firm were not parties to the action. At Spring Term, 1883, the defendant's objection was overruled,

to which he excepted, and the referee was directed to proceed under the previous order.

The parties by counsel and in person appeared before the referee on September 5th, when he proposed to take the account, whereupon defendant's counsel interposed a counter-objection to the taking any evidence in regard to the $2,000 charge, as being an item in a partnership matter, which could not be divorced from the general account, and made a separate debt, on demand by one partner against the other; and he also objected to it as growing out of the relations of the several obligors as co-principals.

On the contrary, plaintiff's counsel insisted, that the objection, if of any force, came too late, as the pleading, though in form a replication, had been, since its filing in 1873, treated as part of the complaint, and repeated orders and other proceedings had in the meantime taken place.

The referee therefore took no further evidence on the point, and made his final report; finding it impossible without proof to state the account, deciding that the defendant's objection came too late, and that the sum heretofore reported is the true balance due from the defendant to the plaintiff.

There was judgment in favor of the plaintiff, and the defendant appealed.

Mr. John Manning, for the plaintiff.
Messrs. B. I. Houze and *E. C. Smith*, for the defendant.

SMITH, C. J., (after stating the facts). We do not deem the presence of the three other partners essential, since it appears that each of them is insolvent; Williams dead, with no representative; Banks non-resident; and Elliott only, residing in the State. The suit on the notes given for the steam-boat was settled by the payment of $1,250, by the plaintiff, of a like sum by the defendant, and the plaintiff's surrender to Harris of a claim held by him against Elliott

and Harris, the latter being a surety, for $2,148, making the excess $2,000 paid by the plaintiff.

Confining our attention to this item as derived from the plaintiffs' own funds, and as affected by their relations upon the note, it appears to us that while this sum in its whole amount should be charged to the *copartnership account*, yet only one half of it is due from the defendant to the plaintiff, just as would have been the plaintiff's money payment divided between the parties, but that an equal sum was paid by the defendant, and thus their contributions are equal.

So must it be as to the alleged excess of the plaintiff's payment. There may be some explanation on this point, as we must infer from the fact that there is no controversy about the amount. What effect the correction may have upon the result, will appear upon a re-statement, if found necessary. We deem it therefore proper before any final judgment, to have the point enquired into.

So far as the objection rests upon the form of the pleading, the charge being termed a replication, it is untenable.

While a counter-claim to a counter-claim is inadmissible upon the strict rules of pleading, its early introduction in the action without objection to the manner of introducing, requires us at this late stage to assign it a place in the complaint as an amendment, not as supplementary, but as belonging to the first allegation of the plaintiff's cause of action.

We therefore deem it proper to direct an inquiry upon the point whether the whole $2,000 shall be charged against defendant, or one moiety only of it, and the reference will be to the same referee.

Reference directed.

JOHN H. HANNON v. JAS. M. GRIZZARD et als.

Office—Election—County Commissioners.

1. Qualification is as essential as election to the right to hold office, for the right of one elected to an office to be inducted, is in subordination to the Constitution, and the officer must possess the constitutional qualifications, before he can fill the office.
2. The result of the vote is conclusively settled, so far as the Board of County Commissioners are concerned, by the certificate of the Board of Canvassers.
3. It is reasonable to presume and to act upon the presumption, that a person chosen by the electors is qualified to hold the office, but if the Commissioners are satisfied, or have reasonable grounds to believe, that the person elected is disqualified by the Constitution from holding the office, they are not required to induct him.
4. So where a person was elected to an office, but the Commissioners, acting in entire good faith, refused to induct him, on the ground that he was disqualified under the Constitution from holding the office, but upon a suit instituted to try the title to the office it was adjudged that he was qualified; *It was held*, that an action would not lie against the Commissioners to recover damages for the profits of the office, lost by their refusal to induct.
5. If the action of the Commissioners in such case had been prompted by malice, or to accomplish any unlawful end, the action would lie.

(*Worthy* v. *Barrett*, 63 N. C., 199; *McNeill* v. *Somers*, at this Term; *Hannon* v. *Grizzard*, 89 N. C., 115; *Lee* v. *Dunn*, 75 N. C., 595; cited and approved).

CIVIL ACTION, heard upon a case agreed, by *Shepherd*, *Judge*, at Spring Term, 1886, of HALIFAX Superior Court.

The plaintiff, with the certificate of his election to the office of Register of Deeds in the county of Halifax from the County Canvassing Board, presented himself before the defendants, the county commissioners, on the first Monday in December, 1882, and tendering the bond required by law, demanded to be inducted into office, on taking the prescribed oath. Against this was offered a protest from some of the

electors, on the ground of non-residence rendering him under the Constitution ineligible. To this paper a response was made, denying that he was not a resident of the county, and averring a want of jurisdiction in the commissioners to inquire into the controverted facts.

The defendants thereupon adjourned the meeting for one week, that the parties might prepare their testimony, and on re-assembling, instituted an investigation, the result of which was to declare a vacancy by reason of the alleged disqualification, and then they proceeded to fill it by the appointment of the defendant Grizzard, chairman of the board, and a competitor in the election. He thereupon entered into the office, and held it until the 6th day of November of the next year, meanwhile receiving the fees and perquisites of the place, when he was ousted by a judgment of this Court in an action of the plaintiff instituted to test the title to the office.

The present action, begun on April 7th, 1884, is instituted against the defendants, then constituting the board of county commissioners, to recover in damages the losses in fees and other emoluments sustained by their refusal to induct him to the office, and for this illegal action only. The recipient of those moneys upon whom the liability primarily falls, is wholly insolvent, and he is associated with the other defendants, as a body, in the act of exclusion.

In the case made up for this Court and signed by opposing counsel, it is admitted that the defendants, "in passing upon the question of eligibility of the plaintiff, acted in good faith, and conscientiously in discharge of what they conceived to be one of their duties, as the board of commissioners of Halifax county."

There was a judgment for the defendants, and the plaintiff appealed.

Messrs. J. M. Mullen and *J. A. Moore,* for the plaintiff.

Messrs. T. N. Hill, R. O. Burton and *Spier Whitaker,* for the defendants.

SMITH, C. J., (after stating the facts). The first inquiry, the solution of which in favor of the defendants disposes of all the other matters involved in the appeal, is whether they, in assuming jurisdiction in the premises and acting upon their conscientious convictions, incurred personal liability to the plaintiff for their action in refusing to admit him. In *Worthy* v. *Barrett,* 63 N. C., 199, the plaintiff (or petitioner as he is called,) received a majority of the votes cast for the office of sheriff of Moore county, but his induction into office was denied by a majority of the commissioners, for the reason that he was disqualified to hold it and exercise its functions, under the interdict contained in the recent amendment to the Constitution of the United States, article 14; whereupon, he obtained an order for the issue of a writ of *mandamus* against the board of commissioners, to compel them to admit him, and from the judgment in that action the defendants appealed. Upon the hearing, the ruling was reversed, the Court being of opinion that the disqualification did attach, and that the defendants did not commit a wrong in preventing the intrusion into office of a claimant not competent to fill it. The controversy then, as it now is, was as to whether the action of the commissioners was ministerial or judicial. Upon this point, READE, J., speaking for the Court, uses this language: "The solemn act of administering an oath and inducting into office, may not be *merely ministerial.* But if it were, the Court will not compel them to do wrong, if it be clear that they did right."

McNeill v. *Somers,* at this Term, is to the same effect. If then, the plaintiff in his action against the usurping occupant, had been found to be ineligible for the place, and had failed in his effort to recover it, it is plain, he would have

no cause of action against the commissioners, for he would not have been kept out of an office to which he was entitled; for *qualification is as essential a condition as an election to the holding of the office, and exercising its appropriate functions.* If it be a tort to entertain an inquiry into the constitutional competency of the person elect, and the duty to induct is absolute and unqualified, why would not a cause of action be furnished in denying the alleged right of admission alike in either case? If the power exists to examine into the qualifications of the applicant under any circumstances, the liability cannot be contingent upon the correctness of the conclusion arrived at, resting upon the commissioners in one case, and removed in the other.

But it must be remembered, that the public have a right and an interest in having offices and places of trust filled by persons who, under the law, are alone declared competent to discharge their duties. The right of one elected by a vote, to be inducted into office, is in subordination to the Constitution, and he must possess the qualifications it prescribes. The result of the vote is conclusively settled, so far as the action of the commissioners is concerned, by the Canvassing Board when authenticated by their certificate, but the person elected must be competent to occupy the place. The electors select, but they must select one who has the necessary qualifications. Are the commissioners bound in all cases to admit into office persons whom they know to be disqualified, or of which fact they have abundant and satisfactory proof, as of alienage or of conviction and adjudged punishment for an infamous crime, or of non-residence, upon peril of personal responsibility for an erroneous judgment? If so, the rule is a harsh measure to be meted out to those public officers in their honest endeavours to do their duty.

We do not mean to encourage the assumption of this power, for, exercised indiscriminately, it is liable to great

abuse and often oppression. It is reasonable to presume, and act upon the presumption, that a person chosen by the electors has the required qualifications, and that he should be permitted to enter upon the office. But in a case where the possession of the necessary qualifications is drawn in question by the protest of a considerable number of the electors, and after an honest and diligent examination of facts, it so appears to the commissioners, (although the evidence was in great doubt, as appears in the opinion in *Hannon* v. *Grizzard*, 89 N. C., 115,) it would be manifestly wrong to punish them in damages for an error in judgment.

The power to exclude from office one elected to it, because he had not complied with the conditions of admission in producing before the Board the evidence of a settlement of taxes collected under a previous incumbency, was upheld in *Lee* v. *Dunn*, 75 N. C., 595, as rightfully exercised.

The plaintiff's demand rests upon an alleged illegal assumption of authority to make any inquiry into his constitutional fitness and act upon it, irrespective of the correctness of the conclusion reached. In other words, it denies the right to refuse admission, even if disqualification does exist. This is to assert that one whom the law prohibits to hold office and to discharge its functions, has a right to be admitted, though then liable to be removed, and that it is a remediable wrong in the commissioners to recognize the force of the constitutional interdict in their own action in the premises. The Canvassing Board, as we have said, determine the result of the election; the commissioners induct into office those who have been elected, and who are qualified to hold it. Both conditions, and alike essential in each, underlie the right to take it, and while in a palpable case, the applicant may be denied admission, and no wrong done him, and the like result follows a correct determination of the incapacity, it would be strange to visit with damages, an unintentional error as decided in a subsequent suit.

We concur with the Judge, that the action does not lie in this case, though it would if the action of the commissioners had been prompted by malice, and as a means of accomplishing an unlawful end.

No error. Affirmed.

THE TRADERS NATIONAL BANK OF CHARLOTTE et als. v. THE LAWRENCE M'F'G CO. et als. THE SAME PLAINTIFFS v. THE SAME DEFENDANTS—J. R. HALL'S APPEAL. THE SAME PLAINTIFFS v. THE WOODLAWN M'F'G CO. et als.

Reference—Usury—Bonds of Corporations—Registration—Mortgage—Materials—Liens.

1. Where an appeal is taken to this Court from the action of a Judge in passing upon exceptions to the report of a referee, exceptions should be taken and stated in the record to the rulings of the Judge which it is sought to have reviewed, and the case ought not to be sent to this Court to be heard only on the exceptions taken to the ruling of the referee.
2. Where the charter of a corporation allowed it to borrow money on such terms as its directors might determine upon, and to issue bonds or other evidences of indebtedness: *It was held*, that this provision allowed it to sell its bonds below their face value, and where it did so, the loan was not for that reason usurious.
3. A provision in a charter allowing a corporation to *lend* money at a usurious rate of interest, does not confer the power on them to do so, but a provision to *borrow* money at such rate, is not liable to any objection.
4. Where one who knows of a prior unregistered deed of trust or mortgage, procures a mortgage for his own benefit on the same property, which is registered first, he gets the first lien on the property, unless he used fraud to prevent the registration of the mortgage which is first in date.
5. Where a bond secured by a mortgage is surrendered and a new bond taken in its place, the new bond will be secured by the mortgage, unless it appears that an extinguishment of the debt was intended.

6. Two corporations were under the same management, and one of them executed a mortgage on its property to secure a debt, and afterwards this debt was assumed by the other corporation, which executed a mortgage on its property to secure it, and the mortgage on the property of the original debtor corporation was cancelled. After the expiration of some time, the original debtor corporation again assumed the payment of this debt, executed a new mortgage to secure it, and the mortgage on the second corporation was cancelled: *It was held*, that under the provisions of our registration laws, as against creditors, the cancelled mortgages were inoperative, and the secured creditor could claim no liens or priorities under them.

7. As a general rule in the construction of statutes, a *proviso* will be considered as a limitation upon the general words preceding, and as excepting something therefrom, but this rule is not absolute, and the meaning of the *proviso* will be ascertained by the language used in it.

8. The provisions of Bat. Rev., ch. 25, §48, (*The Code*, §685,) apply to corporations generally, and are not restricted to those only, formed by foreclosures under a deed of trust of an insolvent or expiring corporation.

9. So, where a corporation made a mortgage for the purpose of securing bonds to raise money; *It was held*, that the debts owing by such corporation at the time the mortgage was executed, were entitled to priority over the bonds secured by the mortgage.

10. The act of 1879, which provides that mortgages executed by corporations on their property or earnings, shall not exempt the property or earnings from executions for the satisfaction of a judgment obtained for labor performed, materials furnished, or for torts committed by such corporation, so far as it relates to labor and materials furnished, is only intended to more effectually secure the lien given by the Constitution and statutes to laborers and material men, and was not intended to create a lien in favor of parties who furnish machinery, &c., to the corporation upon its personal credit.

(*Simonton* v. *Lanier*, 71 N. C., 498; *State* v. *Matthews*, 3 Jones, 451; *Hyman* v. *Devereux*, 63 N. C., 624; *Kidder* v. *McIlhenny*, 81 N. C., 123; *Flemming* v. *Burgin*, 2 Ired. Eq., 534; *Mason* v. *McCormick*, 75 N. C., 263; *Same Case*, 80 N. C., 244; *Lanier* v. *Bell*, 81 N. C., 337; cited and approved).

These were CIVIL ACTIONS, heard upon exceptions to the report of a referee by *Avery, Judge*, at Spring Term, 1886, of GASTON Superior Court.

The Lawrence Manufacturing Company, created by a special act of the General Assembly, private acts, 1879, ch. 63, a defendant with others in one action, and the Woodlawn Manufacturing Company, formed under the general law contained in Battle's Revisal, ch. 26, sued, with other defendants, in another action, which actions have been consolidated and prosecuted as one, became involved and embarrassed in the prosecution of their business operations, to procure relief from which, the latter company on November 16th, 1879, obtained from the defendant J. W. Fries a loan of $10,000, for which it gave its note, and to secure the same, executed a mortgage deed conveying its corporate property and franchises.

The two companies, located near each other in the county of Gaston, and engaged in the same general business of manufacturing, were under the management of the same officers and agencies, and most of the capital stock in each was held by the same owners.

In January, 1880, the indebtedness of the borrowing company was assumed by its associate, which substituted its own note therefor, and made to the creditor a similar mortgage of its own property to assure its payment. Thereupon the first note and mortgage were cancelled.

On March 30th, 1882, the debt was re-assumed by the Woodlawn Manufacturing Company, which, after making a payment of $2,500 on the debt, gave its note to said J. W. Fries for $7,500 and executed a second mortgage to secure the residue, upon its lands, mill, machinery and all waters and water privileges used in connection therewith; whereupon the note of the second mortgagor company was also surrendered, and its mortgage in like manner cancelled for its exoneration. This mortgage was proved the next day and admitted to registration in Gaston county on the 1st day of April, 1882.

Under a resolution of the directors and with the approval of the stockholders, on the day of registration of the last mortgage to Fries, the Lawrence Manufacturing Company executed a deed conveying all its land, mill and machinery thereon, rights, privileges and franchises, to the Fidelity Insurance Trust and Safe Deposit Company, a corporation formed under the laws of Pennsylvania, and located in the city of Philadelphia, in trust to secure forty-five coupon bonds, each of the denomination of $1,000, bearing interest at the rate of seven per cent. per annum, which the company caused to be issued and placed in the hands of the defendant Hall, he guaranteeing that they would bring upon a sale a sum not less than two thirds of their face value.

Unable to dispose of them in the market on these terms, Hall, in pursuance of his contract, took the bonds himself, and paid over to the company the stipulated sum of $30,000, from which was deducted a sum charged by the agent for his services in obtaining the loan. On July 15th following, both corporations becoming utterly insolvent and incapable of carrying on their business, the Lawrence Manufacturing Company made an assignment of all its property, the land, mill and machinery thereon, with all its rights and privileges, to John M. Williamson, of Philadelphia, in trust to secure such of its notes, bills and other business paper on which there were endorsers or guarantors for its accommodation, as well as certain debts specifically mentioned; and secondly, to secure all other of its debts not mentioned.

On the same day, the Woodlawn Manufacturing Company made a similar assignment of its property to the same trustee, to secure such of its debts as had accommodation endorsers or guarantors, and the same creditors whose claims are preferred in the deed of the other corporation. These deeds were made by the same official agencies and in terms identical in declaring the trusts, *mutatis mutandis*.

The actions were instituted by unpreferred creditors against the separate companies, for an adjustment of their liabilities, and the appropriation of the property of each thereto, and, as they were under the same management, and their operations and interests intermixed, they have by consent been considered, prosecuted and defended as a single proceeding.

A reference was made to T. H. Cobb to ascertain the outstanding indebtedness of both companies, the resources applicable thereto, and the manner in which they should in law be appropriated to the defendant's debts. He made such inquiry, and reported the full and voluminous evidence of the demands against each; and his findings of fact and conclusions of law as to priorities in the distribution of the funds, to which exceptions were entered by the contestant parties, and from the rulings of the Judge thereon appeals are taken to this Court.

Mr. W. P. Bynum, for the plaintiffs.

Messrs. J. C. Buxton and *C. B. Watson*, for the defendant Fries.

Mr. Jos. B. Batchelor, (*Messrs. P. D. Walker*, *A. Burwell* and *Geo. F. Bason*, also filed a brief,) for the other defendants.

SMITH, C. J., (after stating the facts). It is to be observed, that no specific exception is taken to the rulings of the Court, as should have been done, limiting the examination to them, many of which objections to the referee's report, if this had been done, might not have been pressed in this Court, and so relieved it of unnecessary labor. The proper course is to state the exceptions to the rulings of the Court which the appellant wishes to be reviewed, after the rulings have been made, and to let them come up as part of the record, as contemplated in §418 of *The Code*. This would serve as a distinct and definite announcement to the oppo-

sing party of the matter relied on, lessen the labor of the Court and counsel in hearing the appeal, and tend to a fair trial of the cause.

While there are, as there should be, full records in each appeal, it will be more convenient to consider, in proper order, the exceptions of the appellants and dispose of them, as they arise, in one opinion.

Preliminary to this, we advert to the fact that the said Hall, originally a defendant, having by assignment become the owner of many of the proved claims, and purchaser of the corporate property of both companies at foreclosure sales, has assumed the place of plaintiff, and filed an independent complaint in the cause. We proceed accordingly to an examination of the essential subject matter involved in the exceptions.

The mortgage of April 1st, 1882: Objection is made to the validity of the bonds secured in this deed for their full amount, as a loan unwarranted by law as usurious and void, for the excess above the sum borrowed.

The answer to this, is found in section 14 of the charter of the Lawrence Manfacturing Company, which declares that this corporation may borrow money on such terms as its directors may determine upon, and they may issue bonds or other evidences of indebtedness.

It is true that words, essentially similar, contained in the charter of the Bank of Statesville, by which it was authorized "to lend money upon such terms and rates of interest as may be agreed upon," were held to confer a power to be exercised under the restraints of the general law, and not independently of them. *Simonton* v. *Lanier*, 71 N. C., 498.

A like limiting interpretation was given to general words in the charter of the Bank of Fayetteville, authorizing it to issue notes, and not defining their denomination, in *State* v. *Matthews*, 3 Jones, 451.

But these cases differ from that before us, in that, here the enabling provision is for the benefit of the borrower, and that it may secure needed financial assistance in carrying on its business operations, while in the others the claim was not allowed to relieve those banking institutions from the restraints imposed by law upon all others, nor, in terms, does it undertake to do so, to the oppression of those who deal with them. *Morrison* v. *Eaton & Hamilton R. R. Co.*, 14 Indiana, 110.

The mortgages to Fries: In *Hyman* v. *Devereux*, 63 N. C., 624, a note secured by a mortgage and transferred to an assignee, was surrendered, and a new note, both under seal, executed to the assignee in its place, and it was insisted that the new security was no longer protected by the mortgage. But it was held, that this result did not necessarily follow the act of substitution, unless it was shown that an extinguishment of the debt was intended, and still less, in the words of RODMAN, J., "can it be presumed in the absence of proof that a creditor who takes a note in the place of a former one, intends to discharge the mortgage."

The same ruling was subsequently made in *Kidder* v. *McIlhenny*, 81 N. C., 123.

In the present case, while the identity of the indebtedness remained, as respects the creditor, it was changed into a new security, taken from one not bound by the former, and a mortgage given by the new debtor upon its own property, the former being given up and extinguished or cancelled. After an interval of more than a year, this arrangement was superseded by another, in which the borrowing company resumed its original liability, paid one fourth part of the debt, gave a new note for $7 500, (the residue,) and executed a second mortgage on its property, then owned, for its security, the second note and mortgage being at the same time cancelled. If there is any effect to be given to our registration law, the contention that the debt constitutes a lien

under the antecedent cancelled mortgages, cannot be sustained to the prejudice of intermediate debts. A creditor examining the registry, would find that there was no mortgage on the property of the Woodlawn Manufacturing Company, after its cancellation or entry of satisfaction, when that of the other Company, with a new contract of indebtedness and a conveyance of its property to secure it, had taken the place of the first, and he might safely rely upon the exonerated and other means of the first mortgagor to meet a new contract with himself.

This is repugnant to the letter and policy of the law, which in express terms requires deeds in trust to be registered before they can have operation against creditors and purchasers for value, (*The Code* §1254,) and points out how, when so registered, they may be discharged, (§1271). This evidence is furnished by an inspection of the registry, and is for the protection and safe dealing of others with the mortgagor or maker of the trust deed, and would be misleading and delusive, if satisfied and cancelled mortgages, so shown upon the registry, could be afterwards re-instated and given precedence over debts contracted after such examination.

So imperative is the requirement that such deeds, to be effective, must be registered, that one who knows of the execution of a prior deed of trust, and procures one upon the same property from the mortgagor, and causes it to be first registered, unless fraud was used to prevent the earlier registration of the first, acquires the preferable right, and equity will not interpose for his relief. *Flemming* v. *Burgin*, 2 Ire. Eq., 584.

There is no error in the ruling as to this debt.

III. The debts contracted prior to April 1st, 1882: These are given priority in the distribution of the assets of the Lawrence Manufacturing Company, by virtue of the *proviso* contained in §3 of chapter 131, Acts of 1872–'73, which is as follows: "That all debts and contracts of any

corporation, prior to or at the time of the execution of any mortgage or deed of trust by such corporation, shall have a first lien upon the property, rights and franchises of said corporation, and shall be paid off or secured before such mortgage or deed of trust shall be registered." *Battle's Revisal*, chap. 26, §48.

The proper interpretation of this *proviso* makes the controversy, the ruling in reference to which constitutes the alleged error presented in the exception.

On the one side it is argued, that the *proviso* is annexed to corporations authorized to be formed by purchasers under a deed of trust or mortgage made by an insolvent or expiring corporation, and does not extend to such a mortgage as the present, and this inference is drawn from the beginning words of section three, "when such corporation shall expire or be dissolved," meaning such purchasing corporation to be constituted under the act.

On the other hand it is insisted, that the clause says "that all debts and contracts of any corporation prior," &c., and not of such corporation, thus giving a wide and unrestricted operation to the *proviso*. This construction is sought to be fortified by the succeeding section, which declares the provisions of the act shall not apply to a corporation in which the State has an interest; for the State would have no interest in a corporation formed of purchasers, and there would be no necessity for this exemption, unless existing corporations were meant, in which are not to be included such as the State had an interest in. Moreover, it is required that existing debts shall be paid off or secured before the "mortgage or deed in trust shall be registered."

It is true these contrariant interpretations find, each, some support in the uncertain terms in which the legislative intent is expressed.

Some inference of an intent to extend the *proviso* to corporations generally, however they may have been brought

into existence, may be drawn from terms of the replacing enactment in *The Code*, §685, which extends to all corporations, and renders every conveyance of their property made absolutely, or upon condition, in trust, or by way of mortgage, "void and of no effect as to existing creditors, and as to claims for torts committed previously thereto, when otherwise satisfaction could not be obtained." The claim must be enforced by action, however, within sixty days.

This section has no application to the present actions, which were begun in the Fall of 1882, before the statute went into effect, but it is some indication of the enlarged scope intended to be given to the *proviso* in the former enactment which, with some modification, is transferred to *The Code*.

Moreover, the primary purpose of the legislation is to impose restraints upon insolvent corporations, and disable them from borrowing money and conveying their property to secure it, whereby present liabilities might go unpaid.

Hence, satisfaction of, or security for, these is required, to give efficacy to the deed by putting it on the registry; and we can see no reason why a limited number of corporations, determined by their mode of origin, should be, and none other, embraced in the operation of the statute. If a construction extending it to existing liabilities be admitted, the effect would be to convert an intended preferential assignment into one for the common benefit of all creditors, or to render the assignment nugatory, unless the omitted liabilities should be first secured.

For these reasons we feel constrained to give the larger scope to the *proviso*, and put it in this respect in harmony with the present law.

While it is a general rule in the construction of statutes, to consider a *proviso* as a limitation upon the general words preceding and excepting and taking out something therefrom, the rule is not absolute, and the meaning of the *pro-*

viso must generally be ascertained from the language used in it, and of this we have examples.

An instance of this is found in *Mason* v. *McCormick*, 75 N. C., 263, where a *proviso* to the act which allowed parties to testify, was held to impose a disability upon a witness who at the time was a surety to the prosecution bond, and even the removal of the interest would not restore his competency to give evidence. *Mason* v. *McCormick*, second appeal, 80 N. C., 244.

IV. The indebtedness incurred for labor done and materials furnished before April 1st, 1882:

These preferred claims are enumerated by the referee in paragraph 35 of his report, five in number, amounting in the aggregate to $15,112.77, due from the Lawrence Manufacturing Company; and those against the Woodlawn Manufacturing Company, four in number, are found in paragraph 36, amounting to $1,719.67.

These claims are allowed priority by virtue of the Act of 1879, which provides that mortgages of incorporated companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in Courts of this State against such corporation for labor performed or material furnished such corporation, nor for torts committed by such corporation, its agents or employés, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding. *The Code*, §1255.

The statute does not directly invalidate such mortgages, but, notwithstanding such attempted alienation, exposes the corporate property to execution issued upon a judgment recovered upon the causes of action mentioned. Literally and strictly, it does not apply to the present case, as there are no conflicting claims to title between the mortgagee and pur-

chaser at execution sale, or the privies of such, but the statute must be given a wider meaning, and if applicable, govern the disposition of funds under control of the Court.

There would seem to be no necessity for this enactment, which protects claims for labor done or material supplied, or for torts committed, in presence of that before referred to, which covers all demands for debts and torts, those enumerated in section 685, as well as others.

We are disposed to concur in the view of counsel for the appellant Hall, that the section, so far as it relates to claims for labor performed, or material furnished, pursuing very nearly the words used in §1781, was designed, by its disabling effect, to more effectually secure the liens given by the Constitution to the laborer, (Art. 10, §4,) and the statute extending the lien to materials furnished. But the lien is further extended to torts, and compensation is provided against any alienation attempted to defeat the claim.

But the statute does not, in our opinion, contemplate a lien security for machinery and other articles purchased abroad in putting up the mill, or facilitating its workings afterwards, when it is apparent, personal credit was alone looked to for payment, and a negotiable security taken. *Lanier* v. *Bell*, 81 N. C., 337.

The consequences would be pernicious and destructive of all fair and safe dealings with corporations, if a secret lien founded upon a sale by a distant creditor, of which a person had no information or means of information provided by law, could be set up as paramount to his demand, and unless imperatively demanded, such a construction ought not to be put upon an enactment as will lead to this result.

The referee finds that after paying the preferred debts, to-wit, those contracted previous to April 1st, 1882, and those for labor and material, the assets of the Lawrence Manufacturing Company will be absorbed in, and insufficient to pay the mortgage bonds; and that the assets of the Woodlawn

Manufacturing Company, applied to the lien debts as above, and then to the debt due J. W. Fries, will be consumed.

What effect the displacement from the list of preferred claims under the statute will have upon those next in order, under the respective assignments of July, 1882, by both companies, must be ascertained upon a re-reference of the account to be stated upon the basis of this opinion, and it is accordingly again referred to the same referee.

If in the confused and complicated case presented in the record, our general rulings upon the law do not cover all the exceptions, they may be again presented on the coming in of the report, in the same manner as they are now.

We repeat, there are no special exceptions to the rulings of the Judge except as they are involved in those taken to the report, and this is not sanctioned by the practice.

This disposes of all the appeals.

Remanded.

JOSEPHUS BAUM et al. v. THE CURRITUCK SHOOTING CLUB.

Possession—Evidence of Pleading.

1. Exercising such a dominion of land, and making that use of it, to which it is capable of being put in its then state, such acts to be so repeated as to show that they are done in the character of owner, is a possession of land, as distinguished from mere trespasses.
2. Where the land in question was directly on the ocean, and had been incapable of cultivation for a long period, and there was evidence that the plaintiffs and those under whom they claimed had cultivated a part of the land as long as it was fit for that purpose, and subsequently had used it in the only way in which it was capable of being used, by grazing cattle on it, and renting it out to shooters: *It was held*, some evidence of possession to go to the jury.

3. In a petition for partition, an allegation that the defendant has an estate in a certain number of acres of said land, is insufficient, as it would indicate that the defendant has a several estate in that number of acres.

(*Simpson* v. *Blount*, 3. Dev., 34; *Williams* v. *Buchanan*, 1 Ired., 535; *Gudger* v. *Hensley*, 82 N. C., 481; *Staton* v. *Mullis*, 92 N. C., 623; cited and approved).

CIVIL ACTION, tried before *Shepherd, Judge*, and a jury, at Fall Term, 1885, of CURRITUCK Superior Court.

This proceeding, instituted in the Superior Court of Currituck county, before the clerk, on the 6th day of September, 1883, upon an allegation of a tenancy in common among the parties, is to have partition of a tract of land, described in the petition as containing two hundred acres more or less, and lying between the waters of Beasley's Bay and the Atlantic Ocean. The allegation is, that the plaintiff Josephus Baum is entitled to one moiety of the land, the defendant company to twenty-five acres thereof, and the plaintiff Edward M. to the remainder.

The answer, denying the other allegations, admits that the said Josephus and the company hold as tenants in common a tract of land adjoining the land of the defendant on the north and south, between the aforesaid waters, which is capable of division, and assents to its being made under the direction of the Court. The issue thus made, was transferred to the Superior Court in term, and put upon the civil issue docket for trial, and is in this form: "Are the plaintiffs, or either of them, tenants in common of the lands described in the complaint, except that part admitted in defendant's answer?" And to this the record states the jury answered "No."

Upon the trial, the plaintiffs introduced a series of deeds, with the will of one Joseph Baum, copies of which are set out as exhibits, and are as follows:

I. From Joseph Gray and wife Mary, made October 24th, 1801, to Thomas White, describing the land conveyed as

"containing fifty acres, lying on the said Banks: to be laid off on the north end of a deed given by William C. Dowdy to John Woodhouse, bearing date the 20th day of February, 1745, to be as wide on the Sound side as on the sea-side, so as to include the aforesaid fifty acres.

II. From said Thomas White to Willoughby Dowdy, dated June 7th, 1819, with the same words of description, except substituting the word "sound" in place of the word "said," immediately preceding "Banks." The latter is obviously a miscopy.

III. From Willoughby Dowdy to Samuel Cooper, executed January 29th, 1840, designating the land as situated on the Banks, bounded as follows: on the north by Thomas Poyner's line; on the west by the Bay; on the south by the lands formerly belonging to Thomas Dowdy; thence an east course to the sea; thence along the sea to the first station, containing fifty acres."

IV. From Samuel Cooper to C. T. Chaplain, trustee, dated February 3d, 1840, conveying by a similar description as the preceding deed.

V. From said trustee on January 12th, 1844, to Joseph Baum, the highest bidder at a public sale, with a slight variance in the terms of description, thus: "A certain tract of land on said Banks and marsh, lying at the head of Beasley's Bay, near the sea, joining the sea on the east, joining the lands of Abraham Baum on the south, joining the bay on the west, and joining the land of the Poyners on the north, being one hundred acres more or less."

VI. The will of the last named grantee, dated November 11th, 1880, and duly proved and recorded, in the 5th clause whereof, he devises as follows: "I give and bequeath to my two sons, Jacob and Josephus Baum, all of my lands lying between Beasley's beach and the Old House Creek, together with all my island of marsh, lying to the north of Peter's Creek, to the north end of Hog Island; also one hundred

acres of beach land, which I purchased of Caleb Dowdy and Samuel Cooper, a reference to the deeds from said Dowdy and Cooper will more fully appear, it being the land whereon my son Abraham Baum now lives," &c.

VII. A deed from Caleb Dowdy and his mother Sarah, made in 1838, to the aforesaid testator in his life-time, conveying their right, title, and claim, "on the North Banks, between Whale Head and the said Joseph Baum's, beginning on the sea-side, joining Willoughby Dowdy's land; thence binding the said Dowdy's line to Currituck Sound, nearly west course; thence as the sound runs, nearly south, to Elizabeth Dowdy's land; thence nearly east to the sea-side; thence as the sea beach to the first station."

VIII. A deed from the commissioner appointed in a petition of the heirs at law of Jacob Baum for partition and sale of descended lands, to E. M. Baum, conveying an undivided half of several tracts, and among them of the "Cooper tract of fifty acres," and of a tract known as "Sal's Hammock," containing one hundred and seven acres, more or less, lying on the north side of Poyner's Creek, adjoining the lands of the Currituck Shooting Club, Josephus Baum and others, all of the said land being marsh or beach land, in said county of Currituck."

Such was the documentary evidence offered in support of the plaintiffs' title, and the oral testimony in supplement was as follows:

Josephus Baum testified as follows: "I knew Willoughby Dowdy; knew him as long ago as forty years. He lived on the west side of the sound. He never lived on the beach. I knew the boundaries of the Willoughby Dowdy land as described in his deed to Samuel Cooper. I knew that its boundaries embraced the land in the plat. I know where the Thomas Poyner line is, and also where the Thomas Dowdy land is; old persons who are dead have told me where the Poyner line was. It is correct as stated in the plat.

I know the Thomas Dowdy line. I am fifty years old. I have known the land ever since 1840. It is on the Banks, lying between the sea and Beasley's Bay. It has been used for gunning and grazing. That is all it is fit for; the sand has nearly covered it all. A part of it was cultivated twenty or twenty-five years ago, by William Dowdy, a tenant of Willoughby Dowdy; afterwards Samuel Cooper cultivated it one or two years, and then by Abram Baum about three. It was cultivated in all for eight years; about one third of the whole tract was covered with myrtle. It is all now a bald beach, and has not been fit for cultivation for twenty-five years. When I first knew it, a third could have been cultivated. It is valuable for shooting. I rented it out several years from 1855 to the war, but not during the war. I did not live on it during the war. After the war I leased it out until 1869. In 1869 the administrator of Jacob Baum rented an undivided half to the Currituck Shooting Club. I have seen them occupying it up to this spring from that time."

Abram Baum testified as follows: "I have known the lands for fifty-five years. I know where Thomas Poyner's line was. My line was the same as Thomas Dowdy's line. Thos. Poyner showed me that line fifty-five years ago. A house was built on the Willoughby Dowdy tract about fifty-two years ago. Willoughby Dowdy built it. It has been moved away for about thirty years. Willoughby Dowdy rented the land three years to William Dowdy. Cooper cultivated it three years, and I cultivated it three years. This land was generally known as the Cooper and Willoughby Dowdy land. For twenty-five years the sand has covered the land, and there has been no fence around it. There was no fence; anybody's cattle could run on it. There has been a box there within the last fifteen years. The Currituck Shooting Club has a box there. Several persons claimed it, but I don't know how; this is the same land as is described in

Samuel Cooper's deed to C. T. Chaplain, and in C. T. Chaplain's deed to Jos. Baum. The land covered by the deed of Caleb Dowdy and Sarah Dowdy is south of the Willoughby Dowdy land. Abram Baum lived on it at the date of my father's will. The Club-house is now situated on it. Caleb and Thomas Dowdy's lines are the same.

"No one cultivated the land in question (the Willoughby Dowdy land) after the house was removed from it, except Abram Baum, who cultivated it subsequently for about three years. That he was present at the division of the Dowdy land; so were Mr. Poyner and some others. At that time Mr. Poyner showed me the south line of his land, which comes down to Glade Creek, and was the north line of the Willoughby Dowdy land. He, Baum, afterwards bought the Thomas Dowdy land, and recognized the division line of the Dowdys. Thomas Dowdy's share was one hundred and fifty acres, and Willoughby Dowdy's share was equally as large. It extended from Thomas Poyner's on the north to my line (the Thomas Dowdy line) on the south. Since I first knew the land there have been large accretions to it by the gradual filling up of the water on the bay, as much as fifty acres.

"The Caleb Dowdy and Thomas Dowdy line is the same as the line of myself and now the Currituck Shooting Club. After my father bought the land, he removed the house, and I cultivated about twenty acres, where the house had stood, about three years. Afterwards my father used the land for grazing his cattle until his death; there never was a fence around the land; then Josephus Baum used it in the same way, and also he rented it out to gunners, until the war; also after the war. The widow of Jacob Baum rented out the interest of Jacob Baum in the same."

The Court being of opinion that upon the evidence the plaintiff could not recover, that is, that there was none to

warrant the jury in finding the affirmative, directed a negative response to be entered.

From this ruling the plaintiffs appeal.

Mr. E. C. Smith, for the plaintiffs.
Mr. John Gatling, for the defendant.

SMITH, C. J., (after stating the facts). Without the aid which the presence of the plat of the surveyor and his explanations of the lines of the disputed territory might have afforded, we find it difficult to understand the matter in dispute.

Assuming, however, the identity of the land as traced through the successive deeds, the first dated more than three fourths of a century back, and the last conveying it to Joseph Baum in January, 1844, who devises in equal parts, in the before recited clause of the will to his sons, Josephus and Jacob, the administrator of the latter of whom, in 1869, rented an undivided half part to the Shooting Club, the only inquiry is, whether the exercise of dominion over the property by the successive claimants, in the manner stated by the witnesses, was evidence to be considered by the jury of a divesting of title out of the State and putting it in the said devisees.

We shall not recapitulate them, as the acts of ownership are fully set out in the testimony of the two witnesses examined, further than to say, that they seem to have been such as were proper to be passed on by the jury. What are acts of possession, as distinguished from trespasses repeated, which in connection with an instrument giving color of title, or so long continued as to avail without such color, have been often heretofore before the Court, and have been as well defined as perhaps the subject matter will admit. *Simpson* v. *Blount*, 3 Dev., 34; *Williams* v. *Buchanan*, 1 Ired., 535; *Gudger* v. *Hensley*, 82 N. C., 481; *Staton* v. *Mullis*, 92 N.

C., 623. The rule is thus declared by RUFFIN, J., in the case first cited: "Exercising that dominion over the thing, and taking that use and profit which it is capable of yielding in its present state, is a possession;" and GASTON, J., similarly defines a legal possession, in the second case, adding thereto the words, "such acts to be so repeated as to show that they are done in the character of owner, and not of an occasional trespasser."

There was evidence approximating, if not fully meeting these required conditions, that should have been submitted to the jury, and there is error in the ruling of the Court that there was none.

It would seem from the complaint that it was intended to charge some interest in the defendant as a tenant in common possessing a present estate in a moiety of the whole land, the remainder being in the plaintiff named, but it is very insufficiently indicated in the allegation that the company have an estate in twenty-five acres, as if a several portion to that extent. But this may be corrected and truly set out hereafter by amendment, as the point is not now before us.

The verdict must be set aside, and a new trial had.

Error. Reversed.

URIAH VAUGHAN v. THE TOWN OF MURFREESBORO.

Taxation—Property.

1. The word "estate" has a broader meaning than the word "property." The latter word would not include choses in action, unless there be something in the context which would require it to receive this interpretation, except by force of the definition contained in *The Code*, §3765, par. 6.

2. So where a statute allowed a municipal corporation to levy a tax upon all persons and property within the town: *It was held*, that this did not authorize a tax on solvent credits, money, or bonds.

(*Pullen* v. *Com'rs*, 68 N. C., 451; *Pippen* v. *Ellison*, 12 Ired., 61; *Scales* v. *Scales*, 6 Jones Eq., 163; *Hastings* v. *Earp*, Phil. Eq., 5; *Hogan* v. *Hogan*, 63 N. C., 222; cited and approved).

This was a CONTROVERSY WITHOUT ACTION, submitted to *Shipp, Judge*, at Fall Term, 1886, of HERTFORD Superior Court.

In the amended charter of the town of Murfreesboro, passed by the General Assembly at its session in 1885, is contained the following provision: "That the board of commissioners shall have power annually to levy a tax upon all persons and property within the town subject to taxation for county purposes under the general laws of the State for the year in which said taxes are levied: *Provided*, the tax shall in no case exceed twenty-five cents on the one hundred dollars' valuation of property and seventy-five cents on the poll." Acts 1885, ch. 138, §9.

At a meeting of the commissioners in May, the same tax was levied as for the preceding year, and to the maximum limit allowed by the act. The plaintiff has paid the full amount of the assessment upon him, except that upon his solvent credits and securities, of which he made no return, but which by order of the board were inserted in the tax list as taken from the plaintiff's return of his taxable property for State and county purposes. The solvent credits and securities, valued at $35,000, consist of notes and bonds due from non-resident debtors, owning no property in the town, and of bonds issued by the city of Norfolk, in Virginia.

The sole question presented in the case agreed is, whether these latter are proper subjects of taxation by the authorities of the town, and the plaintiff liable for the per centum tax thereon, and this requires a construction of the clause in which the right to tax is conferred and limited. The

Court below ruled that the plaintiff was liable, and gave judgment for the Board, from which the plaintiff appeals.

Mr. D. A. Barnes, for the plaintiff.
Mr. R. W. Winborne, for the defendant.

SMITH, C. J., (after stating the facts). A very similar controversy sprung up between the tax paying residents and corporate authorities of the city of Raleigh, and was determined in *Pullen* v. *Commissioners*, 68 N. C., 451. The charter, as it then existed, authorized the commissioners, in order to raise a fund to meet the expenses of the government of the city, to annually levy and collect taxes: 1st. On real estate in the city in a limited amount; 2d. On taxable polls, limited also in amount, and upon six other enumerated subjects of taxation, in none of which was personal property mentioned.

But the Constitution, Art. 7, §9, commands, that "all taxes levied in any county, city, town or township, shall be uniform and *ad valorem* upon all property in the same, except property exempt by this Constitution," by force of which, notwithstanding the omission in the charter, personal as well as real property must be assessed and subjected to the same public burden. The first clause was therefore to be construed as if both kinds of property had been specified, and in the light shed upon the subject by other provisions of the Constitution. Delivering the brief opinion of the Court, which seems to have been guided by the lucid argument of counsel, as to the sense in which the word "*property*" is used in that instrument, the Chief Justice remarks: "In regard to that word, by the by, we see that the Constitution does not make it include 'money, credits, investments in bonds, &c.' 'Real and personal property' is used in a sense to exclude such credits and investments. Art. 5, §3."

Accepting this interpretation of the general term "property" with the prefix "real and personal" as used in the other section, "credits, moneys, investments in bonds, &c.," would not be included, unless it can be seen from the context that the word was employed in a more comprehensive sense and to fill a larger sphere of operation except by force of the statute, (*Code*, §3765, par. 6,) enlarging its import.

So far from this, it seems to be as restrictive as when used in the Constitution. The charter imposes the liability only upon "persons and property *within the town*," and upon such only as are subject to county taxation under the general law, and its maximum measure is upon an *ad valorem* estimate of value. There are no associate words to indicate a larger meaning than the word itself conveys, but, on the contrary, the property must be located *within the corporate limits*, excluding such as has only the *situs* of the owner.

A similar restricted import has been given to the term in testamentary dispositions in several adjudications.

In *Pippin* v. *Ellison*, 12 Ired., 61, PEARSON, J., says: "The word 'estate' has a broader signification than the word 'property.' The former includes *choses in action*. The latter does not, and in reference to personalty is confined to 'goods,' which term embraces things inanimate, furniture, farming utensils, &c.; and chattels, which term embraces living things—slaves, horses, cattle, hogs, &c." This, of course, has reference to the residuary disposition of the testator's estate. *Scales* v *Scales*, 6 Jones Eq., 163; *Hastings* v. *Earp*, Phil. Eq., 5.

In *Hogan* v. *Hogan*, 63 N. C., 222, the bequest was "and should there be anything at my death undivided, it is my wish that it be sold, and equally divided among my four sons, after paying my funeral expenses and all just debts." In the opinion delivered by READE, J., the cases where a restrictive meaning is put upon the words *estate* and *property* are reviewed and distinguished from that then before the

Court, in that the property was to be sold, and the proceeds divided, and the words were of more limited signification, and not as broad as "anything," here used by the testator. But the previous rulings are put upon the ground, that as "credits and money" are not the proper subjects of sale, the intention cannot be imputed to the testator to embrace such in the direction to sell and distribute, and this method of interpretation, if correct, would equally apply to the clause recited. Nor do we see clearly the distinction pointed out in the terms of the bequests. In the other cases there was to be a sale, and the proceeds divided, and is not this the necessary consequence of executing a direction to sell and divide, for after a sale, what was there to divide but the proceeds arising from the sale? The decisions are therefore not in harmony, and are referred to as showing how the usual import of words may be restrained in their operation by the context.

Aside from these interpretations, we see no sufficient reason for departing from the adjudication in *Pullen* v. *Commissioners*, even if the reasoning were not entirely satisfactory to our own minds, and since the localizing words that follow the term must be understood as excluding such property as has no visible form or existence within the town, and attach to the person of the owner.

There is error, and the judgment must be reversed, and to this end, and that judgment be rendered for the plaintiff, this will be certified.

Error. Reversed.

R. A. KING et als. v. MARY E. BLACKWELL.

Public Roads—Issues—Judge's Charge—Verdict.

1. The County Commissioners are vested by the statute with the power to lay out or discontinue public roads, and from their action an appeal lies to the Superior Courts in term, where the issues of fact are to be tried by a jury, and from that Court an appeal lies to the Supreme Court, as in other cases.
2. The main question to be determined as to the propriety of laying out a public road is, whether it is necessary for the public good and convenience.
3. Where in such case, the applicants submitted an issue whether such proposed road was necessary, it was not error for his Honor to add the words "to the public."
4. It is well settled that the omission of the trial Judge to charge the jury in a particular aspect of the case, is not ground for a new trial, when the complaining party did not ask for such a charge.
5. Evidence that there are private ways near to the proposed location of the public road asked for, is competent both before the County Commissioners and the jury on an appeal to the Superior Court, to show that the proposed road is not necessary, because the private ways fulfilled all the public needs.
6. It was agreed that the clerk might take the verdict, but by permission of the Court he was absent when the jury agreed, and they sealed their verdict up and handed it to the sheriff and separated. At the next session of the Court, the trial Judge ordered the jury into the box and the foreman opened the verdict and each juror agreed to it in the presence of the counsel for both sides; *Held*, that the verdict was regular, there being no suggestion that either the verdict or the jury had been tampered with.

(*Brown* v. *Calloway*, 90 N. C., 118; *Terry* v. *The Railroad*, 91 N. C., 236; *Fry* v. *Currie*, Ibid, 436; *Davis* v. *Council*, 92 N. C., 725; *Branton* v. *O'Briant*, 93 N. C., 99; cited and approved).

APPLICATION FOR A PUBLIC ROAD, heard on appeal from the County Commissioners, before *Connor, Judge*, and a jury, at August Term, 1886, of CASWELL Superior Court.

This was an application to the county commissioners of the county of Caswell, to have laid out and established a

public road in that county. Upon appeal to the Superior Court, the appellants prepared the following issue to be submitted to the jury: "Is a public road leading from Siddle's Store, on the Greensboro and Yanceyville road, to Lovelace's Shop, on the Greensboro and Danville road, necessary?" To this the Court added the words, "for the public." The appellants objected and excepted.

There was evidence tending to prove that the proposed road was necessary, and also the contrary. The evidence on both sides showed, that for a distance of six to eight miles there were two roads from the road at Siddle's Store to the road leading by Blackwell's Store, one being about three miles above and one three miles below said store, and that between these two roads there were two others, one by J. W. Cobb's and the other by Brackin and Badgett's, which the public used until after this controversy arose, when Cobb and Badgett, two or the petitioners, had for a short time prevented their use. It was also in evidence, that four roads used by the public, running east and west to Yanceyville, were in the same distance. There was no evidence that the roads by Cobb's and Badgett's and Brackin's had ever been worked as public roads, but they had been used for a long period without objection until this suit. A private road was used along the whole of the proposed route except from Blackwell to Mrs. Blackwell's, about two miles. This had only been used by her permission.

His Honor, in his charge to the jury, stated that to constitute a public road there must be a user for more than twenty years adversely to the owner of the land, and explained to the jury the law under which parties are entitled to have roads opened.

He stated that the jury could consider the evidence in regard to the road by Cobb's and the one by Badgett and Brackin's, with all the evidence in the case, and decide the question submitted to them. The testimony consisted largely of examination of witnesses in regard to a map

used by the counsel, but not furnished to the Court. It was agreed by the counsel, that the Judge need not take any notes of the evidence, and no objection was made to any portion of the charge until after the verdict was rendered, when the plaintiffs excepted, for that upon the evidence the Court should have told the jury that the cross-roads were private ways, and not have left the question to them, as to the character of the cross-roads.

At the conclusion of the trial it was agreed that the clerk might take the verdict of the jury, and the Court adjourned at 7 P. M., to 9½ o'clock, A. M., next day. The jury coming to a conclusion at 11½ P. M., and the clerk having gone home by permission, they placed their verdict in an envelope and sealed the same, wrote on the back of the envelope, "verdict of the jury," and handed it to the sheriff of the county, who had the jury in charge, by instructions from the Judge. The sheriff placed said envelope in his safe and locked the same. The jury then separated.

On the meeting of the Court, the Judge, against the protests of the plaintiffs, had the jury called into the box and the foreman, in the presence of the jury, opened the envelope. The verdict was thereupon returned and recorded in open Court, which was as follows:

"Is a public road leading from a point near Siddle's Store, on the Greensboro and Yanceyville road, to Lovelace's Shop, on the Greensboro and Danville road, a necessity for the public?

Answer—No."

Counsel for the parties being present, each juror stated that the same was his verdict.

At the assembling of the Court, the sheriff handed the envelope to the clerk. There was no suggestion that either the verdict or the jury had been tampered with.

The plaintiffs' counsel objected to the verdict being received or recorded, or the Court finding any facts in connection therewith.

His Honor proceeded to render judgment, from which plaintiffs appealed, and assigned as error the matters herein before set forth.

Mr. John W. Graham, for the plaintiffs.
Mr. J. A. Long, for the defendant.

MERRIMON, J., (after stating the facts). The statute (*The Code*, §2014,) invests the board of county commissioners in each county of the State, with full power and authority "to appoint and settle ferries; to order the laying out of public roads when necessary; to appoint where bridges shall be made; to discontinue such roads and ferries as shall be found useless, and to alter roads so as to make them more useful," within their county; §2038 prescribes that application shall be made "upon petition in writing" to have a public ferry or road laid out and established, and §2039 prescribes how persons dissatisfied with such application, the orders, and the action of the county commissioners in respect thereto, may appeal therefrom to the Superior Court, which Court, in term time, "shall hear the whole matter anew," and the parties to the proceeding, which is summary in its nature, "shall be entitled to have every issue of fact joined in said proceeding tried in the Superior Court in term time by jury;" and an appeal lies from that Court to this, as in other cases.

The roads thus allowed to be established, are public roads, such as are necessary to serve and promote the public advantage and convenience. Hence, a proper and principal inquiry in every application to have a public road laid out is, "is it necessary for the *public* good and convenience?" The purpose is not to serve the particular convenience of private individuals, except as they may realize such advantage incidentally, as constituent parts of the public. If their circumstances are such as to require a private way, the statute

(*The Code*, §2056,) provides how such persons may obtain such way across the lands of others. The inquiry in the present case, was as to the public want. We therefore think, that the Court not improperly added to the issue proposed by the appellants, the words "for the public." These words presented the inquiry to the jury in a broader and more distinct view, while it was not an unjust or improper one. The issue as amended by the Court, made prominent the public, as distinguished from mere private advantage.

The appellants do not complain of the instructions given the jury by the Court, but they insist that it ought to have gone further, and told them, "that the cross-roads were private ways." They did not ask for such instruction, as they might have done if they desired it. In any view of it, it would have been incidental, and had reference to evidence not of much importance. It was not an essential part of the instructions the Court gave and ought to have given the jury. It is well settled, that the mere omission of the Court to give instruction in a particular respect that might have been given, if called to its attention in apt time by the party complaining, is not ground for a new trrial. *Brown* v. *Calloway*, 90 N. C., 118; *Terry* v. *Railroad*, 91 N. C., 236; *Fry* v. *Currie*, Ibid., 436; *Davis* v. *Council*, 92 N. C., 725; *Branton* v. *O'Briant*, 93 N. C., 99.

But if the rule of practice were otherwise, we should think there was no error, as contended, because, if the ways referred to were private ways, the evidence in respect to them was competent to be heard by the county commissioners, and by the jury, in determining the question as to the necessity for the proposed public road. If there were public roads in the neighborhood of that proposed, as the evidence tended to prove, there might be no necessity for it, especially while the private ways mentioned were kept open and allowed to be used by the public, as they have been for a long while. If the private ways serve the public purpose,

or to aid it, as they had done, it seems, for a long while, this might be a sufficient reason why the county commissioners should not order the laying out of a new road, and why the jury should find there was no necessity for such a one. It was competent to show that there were such private ways—that they were open and used by the public, or that, though they had been open and used, the owners of them, or of the soil over which they passed, had closed them. So that the appellants were not prejudiced, as they contended.

The exception in respect to the verdict was properly abandoned. It cannot be sustained.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

D. FRASER et als. v. W. J. BEAN, Adm'r, et als.

Statute of Limitation—Mortgage—Parties.

1. A mortgagee, after the death of the mortgagor, has a right to at once foreclose the mortgage against the heirs at law, and this without regard to the right of the heirs to have the mortgage debt paid out of the personal property of the decedent.
2. The administrator is not a necessary party in an action by a mortgagee to foreclose a mortgage after the death of the mortgagor.
3. An action to foreclose a mortgage, where no part of the mortgage debt has been paid and the mortgagor remains in possession, is barred in ten years from the forfeiture, and the same rule applies where the mortgagor died before the time expired and the action is brought against his heirs.
4. The provisions of *The Code*, §152, par. 3, only bars an action to foreclose the mortgage, and does not bar an action to recover the debt secured by the mortgage.
5. Where the heir successfully pleads the statute of limitation to an action brought to foreclose a mortgage executed by his ancestor, but a

judgment for the debt is obtained against the administrator; *quære*, what will be the result of a proceeding by the administrator to sell the land to make assets to pay the judgment.

(*Averett* v. *Ward*, Busb. Eq., 192; cited and approved).

CIVIL ACTION, heard by *Montgomery, Judge,* on a case agreed, at Fall Term, 1886, of BURKE Superior Court.

This action was brought to foreclose a mortgage of real property only, made to secure certain debts therein specified. The mortgage was executed by Archibald Kincaid on the 17th of June, 1873, and the forfeiture therein provided for, happened on the 17th of December of the same year. The mortgagor, next after its execution, remained in possession of the land during his life-time, as did his heirs at law ever afterwards, and no part of the mortgage debt was paid by any person. He died intestate in March, 1883, and the defendant Bean qualified as his administrator in February, 1885.

This action was begun on the 14th of July, 1885, more than ten years next after the forfeiture of the mortgage happened.

The action is brought against the heirs at law of the mortgagor, who plead and rely upon the statute of limitation, (*The Code*, §152, par. 3,) barring actions on mortgages, the administrator of his estate, and A. J. Corpening, who is alleged to be, and is, in possession of the land, as it seems, with the heirs at law.

The parties waived a jury trial, and the Court having found the facts substantially as above stated, and all defences, other than the statute of limitation, having been waived by the parties, upon consideration, the Court gave judgment, of which the following is a copy:

"It is considered by the Court, that as to the heirs at law of the said Archibald Kincaid, and as to A. J. Corpening, the action is barred by the statute of limitation, and that

they go hence without day and recover their costs of action. That as to the administrator, W. J. Bean, it is further considered by the Court, that there is due the plaintiffs from the estate of said Archibald Kincaid the sum of $382.16, of which sum $214.16 is principal and $168.00 is interest, with interest on said principal until paid."

From which judgment plaintiffs appealed.

Mr. S. J. Ervin, for the plaintiffs.

Mr. John T. Perkins filed a brief for the defendants.

MERRIMON, J., (after stating the facts). In equity, the mortgage of the land in question was simply a security for the debt to the mortgagee, secured by it.

Although the legal title to the land was in the latter, the mortgagor had in his life-time the equitable estate, which he had not disposed of at the time of his death, and which descended to his heirs at law They stood, as to the land and mortgage, in the place of their ancestor, and the plaintiffs' remedy by a foreclosure of the mortgage, was directly against them, whatever additional remedy they may have against the administrator, and without regard to the right of the heir to have the mortgage debt paid out of the personal estate of the intestate. The cause of action—the right of the mortgagee to foreclose the mortgage—survived against the heir, not against the administrator. Hence the latter was not a necessary party, as was decided in *Averett* v. *Ward*, Bus. Eq., 192.

The statute of limitation (*The Code*, §152, par. 3,) provides, that actions to foreclose a mortgage like the one under consideration, must be brought "within ten years after the forfeiture of the mortgage," if the mortgagor has been in possession of the property, and when no part of the mortgage debt has been paid, as in this case. So as more than ten years elapsed next after the forfeiture of the mortgage

in this case, and before the commencement of this action, it is very obvious that if the mortgagor had been alive at the time it was begun, and it had been brought against him to foreclose the mortgage, he might have availed himself of the statute of limitation; and as his heirs stand in his place as to the cause of action of the plaintiffs—their right to foreclose the mortgage—they may do likewise, just as the administrator might do in a similar case, when an action is brought against him upon a debt due from his intestate, barred by the statute of limitation. This is so, because the cause of action survives against them, and involves the estate that descends and belongs to them, subject to the charge of the plaintiffs' mortgage debt upon it.

It should be observed that this statute of limitation bars the action to foreclose the mortgage—it is not a bar to an action to recover the money due upon the debt that is embraced by the mortgage and which it was intended to secure. The mortgage is but a security for the debt, and the right of action to enforce this is what is barred.

The complaint as to the defendant Corpening, simply alleges that he was in possession of the land, and he admits in his answer that he was, but he does not plead the statute of limitation. The appellants' counsel insisted in the argument, that the Court ought not, therefore, to have given judgment in his favor. That it did, is not assigned as error in the record. Moreover, it seems that by common consent of parties, the right of the plaintiffs was made to turn upon the question of the statute of limitation. Hence all other defences were waived. It so appears in the record.

As to what effect the bar of the plaintiffs' action to foreclose the mortgage, will have upon the right of the administrator to have a license to sell the land to make assets to pay debts, including the judgment the plaintiffs obtained against the administrator in this action, we express no opinion. Judgment affirmed.

No error. Affirmed.

C. J. COWLES et als. v. ANNIE CURRY et als.

Assignment of Error—Judgment—Consent.

1. Where a Judge at one term of the Court strikes out a judgment made at a former term and substitutes another in its stead; *It was held*, that this could not be assigned as error in the Supreme Court for the first time, there being no exception to the action of the Court entered at the time.

2. By consent, a judgment rendered at a former term may be stricken out, and a new judgment substituted in its place.

3. Where an order is made recommitting a report to a referee with directions to reform it in the particulars set out in the order, to which no exception is made, the complaining party cannot except to the report as reformed in the manner directed, and thus review the order of re-reference, but he must except to the order itself at the time it is made.

CIVIL ACTION, tried before *Montgomery, Judge*, upon exceptions to the report of a referee, at March Term, 1886, of WILKES Superior Court.

This suit was begun by the issue of a summons in February, 1879, and has for its object the enforcement of payment of an alleged residue of the debt contracted in the purchase of a tract of land, the title to which was retained by the vendors as a security therefor. The subsequent death of the vendors and vendee has made necessary the introduction of many new parties in the cause, and it has been prolonged with numerous intermediate orders, until Spring Term, 1885, when the cause was referred to E. L. Vaughan to take and state an account to ascertain the amount of the purchase money due for the lands in controversy, and if any, to ascertain to whom the same belongs, &c.

At the succeeding term, the referee made his report, finding the facts in regard to payments made of the purchase

money (the only matter in dispute,) to be these: On the day when the bond was given for the purchase money, the purchaser gave the vendors an order in the sum of $550 on the executors of his deceased father, and on the back of the bond, under date April 30th, 1856, is an entry in these words, "Received of C. & W. Gray, executors of William Curry, four hundred and fifty dollars on order," signed with the initials "W. M." The order bears date January 31st, 1860, and has the following endorsement: "Received on the within order from C. & W. Gray, ex'rs of W. Curry, five hundred and eighty dollars, to be credited on Samuel Curry's note to me and M. & D. Gray," signed "W. Masten." The bond or sealed note, order on the executors, and the endorsed payments, were all shown to be in the handwriting of William Masten, deceased.

From these facts, (fully sustained by the evidence,) the referee allowed the single credit of $580 entered on the order, holding that the prior payment upon the note was included in the larger sum, and upon the basis of this computation, there was an unpaid balance of $97.87 due thereon, which, with interest to September 15, 1885, to which period his calculations are made, form an aggregate sum of $248.29. The defendants excepted to the finding that any sum was due on the note, and the plaintiffs moved for confirmation. Upon the hearing, the Court ordered "that said commissioner reform his report, so as to allow the credit of $450 on the note of $550, on the 30th of April, 1856, at the time said credit purports to have been entered."

At Spring Term, 1886, the account was restated and reported in this form:

Note executed March 14, 1856		$550 00
Interest to April 30th, 1856		4 12
		$554 12
Credit of April 30, 1856		450 00
		$104 12
Interest to January 31, 1860		23 42
		$127 54
Amount paid 31st January, 1860, as shown by order		$580 00
Deduct amount credit on note		450 00
		$130 50
Deduct unpaid balance on note		127 50
Amount overpaid		2 50

To this reformed report and statement, the plaintiffs excepted, assigning error in giving credit for both sums, when the referee was directed to allow the payment of $450 only, and in the results produced thereby.

At March Term, 1886, a judgment was rendered overruling the exception and confirming the report, from which the record states an appeal was taken by the plaintiffs.

The judgment and entry of the appeal were stricken out at April Term thereafter, and another order substantially the same, and omitting matter not material in the present inquiry, substituted in its place, in this form:

"This cause coming on to be heard upon the report and reformed report of E. L. Vaughan, and exceptions having been filed to the reformed report, and the same having been overruled, the report is in all respects confirmed.

"And thereupon, the cause coming on to be heard upon the pleadings, exhibits, report and admissions of the parties, the

Court doth find and declare, that on the 14th of March, 1856, Anderson Mitchell, William Masten and David Gray, executed a bond to Samuel Curry, in which they agreed that upon payment by him of the sum of $550, they would convey to him the premises described in the complaint; that the same has been fully paid by Curry in his life-time, and that the said Curry died before the bringing of this suit, leaving him surviving the said Annie, his widow, and Chapman, Simon, William and Elizabeth Curry, his children and heirs at law. It is ordered that said Vaughan be appointed to convey title to the land to said heirs of Curry, and that he be allowed $40 for taking the account, and making deed, one half to be paid each by plaintiffs and defendants, and that defendants recover of plaintiffs their costs."

The following is so much of the case on appeal as needs to be set out here:

"E. L. Vaughan, referee, filed report to Fall Term, 1885, and defendant filed exceptions, and Judge Graves sustained the exceptions and made an order accordingly, to which there was no objection by plaintiffs.

"In obedience to Judge Graves' order, the referee reformed his report, allowing the credit of $450 ordered by Judge Graves, and filed the same so reformed at Spring Term, 1886, to which reformed report the plaintiffs filed exceptions, which were argued before Judge Montgomery; and it appearing that the referee (Commissioner Vaughan) had allowed the credit, (ordered by Judge Graves, and reformed his report, to which the defendants did not except,) the exceptions of the plaintiffs were overruled, and the reformed report confirmed."

"The contest was whether the defendants were entitled to a credit of $580 of date 31st January, 1860, and also to a credit of $450 of date 30th April, 1856, the defendants contending they were entitled to both credits, and plaintiffs contending that the defendants were only entitled to one

credit, to-wit: $580. Judge Graves ordered the credit of $450 to be allowed, and the referee having only allowed said additional credit of $450, (the $580 having been allowed in his former report,) would have allowed the defendants a much larger balance than he did allow; but the defendants not excepting thereto, and asking for the confirmation of the report, the same was confirmed, and the decree rendered which appears in the record. Plaintiffs did not ask an appeal at the rendition of the decree. Notice of appeal was not waived, and no amount fixed as the penalty of the appeal bond, but afterwards the plaintiffs served notice of appeal on defendants, and served statement on defendants' counsel, and defendants having returned the same with their exceptions thereto, the Court, after notice of time and place, has settled the foregoing as the case for the Supreme Court."

The plaintiffs appealed.

Messrs. Jos. B. Batchelor and *R. F. Armfield*, for the plaintiffs.

No counsel for the defendants.

SMITH, C. J., (after stating the case as above). The appellants complained of the action of the Judge in striking from the record the first, and entering the second, a substituted judgment, as unauthorized by law, notwithstanding no exceptions thereto were then taken. This alone would be sufficient for our refusal to entertain the objection made here for the first time, but a more effectual answer is found in the statement contained in the record, that the substitution was "*by consent of parties.*"

The only assignment of error which we can consider, consists in the overruling the exceptions to the referee's corrected account, in the particulars suggested, and these are in substance but one exception.

It will be observed, that the objection rests upon a misapprehension of the change made by the referee in the last rendered account. The credit of $580 is allowed in the first, and he does not add thereto the credit of $450, which if done, would enlarge the excess into hundreds, instead of the small sum found to have been overpaid. He states the account upon the basis of allowing, as directed by the Court, the $450 credit as of April 30th, 1856, and the excess in the credit of January 31st, 1860, over the other, as included in it, which $130 is an *additional sum paid* at the latter date. In other words, the debtor is considered as having paid the smaller sum of $450 at the time of its endorsement on the note, and the further sum of $130 when the order was paid in full, and the credit of $580 entered upon it. The effect of this method of computation is to reduce the interest-bearing principal, after deducting the $450, thereafter to 104\frac{13}{100}$. We do not see any error in this, and if there was error it cannot now be rectified, since the ruling by which that was brought about, in the direction for a reformation of the account, passed without objection from the appellants, as indeed no exception had been taken by them until the second report was made, and the correction was in strict conformity with the order.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

J. L. JONES v. MANFRED CALL and R. W. GLENN.

Reference—Proximate and Remote Damages.

1. This Court cannot consider exceptions to the findings of a referee which depend upon the evidence, when no evidence is sent up with the transcript.

2. Where the plaintiff's business has been broken up by the wrongful act of the defendant, he can recover in damages the profits on contracts which were actually made, and which he was prevented from completing by such wrongful act, but he cannot recover the possible profits which his business would have yielded if not interfered with, as this damage is speculative and remote.

3. So where the plaintiff was a manufacturer of patent tobacco machines and was stopped from such manufacture by the wrongful act of the defendant, and at the time of such stoppage the plaintiff had contracts for machines which would have yielded a profit of $1,700, and the referee found that the business which was broken up was worth $6,000 a year: *It was held*, that the measure of damages was the profit on the machines contracted for, and the estimated profit of the business was too speculative and remote to constitute the measure of damages.

(*Oldham* v. *Kerchner*, 79 N. C., 106; *Lewis* v. *Rountree*, 79 N. C., 122; *Mace* v. *Ramsey*, 74 N. C., 11; distinguished and approved; *Clements* v. *The State*, 77 N. C., 142, doubted).

CIVIL ACTION, heard before *Clark, Judge*, on exceptions to the report of a referee, at February Term, 1886, of GUILFORD Superior Court.

At the December Term, 1880, of the Superior Court of Guilford county, this action was referred to James W. Reid, Esq., to state an account between the parties and report the evidence, his findings of facts and conclusions of law. The referee filed his report, to which exceptions were filed by the plaintiff and by each of the defendants. At Fall Term, 1883, the case was heard before *MacRae, Judge*, upon the

exceptions of the plaintiff and the defendant Glenn, the defendant Call having withdrawn his exceptions and moved for a confirmation of the report of the referee. His Honor gave judgment sustaining the 9th and 10th exceptions of the plaintiff, and the 2d and 3d exceptions of the defendant Glenn, and also the 5th exception as to the measure of damages, and, among other things, adjudged that the cause be re-referred to James W. Reid, Esq., to reform his report, and he was directed, in estimating the damages to the said Jones and Glenn, to consider the loss of profit on the manufacture and sale of machines, on the basis of a continued manufacture and sale, at the time of the interference as set out in finding 17, and also the difference between the market value of said patents at the time of said interference, and at the time of making his report, if he shall find that the difference in value, if any, was caused by said interference.

From this order the defendant Call appealed to the Supreme Court. As the order was interlocutory, and the exceptions to the rulings of the Court embraced in it could be considered after the coming in of the corrected report, if necessary, the appeal was dismissed as premature; 89 N. C., 188.

The referee filed his report to the Fall Term, 1885, as follows:

"I. That in addition to the seventeenth finding of my said former report, I find that by reason of the doings and unlawful interference of the defendant Call, in interfering with and stopping the manufacture of the machines, the sales thereof were withdrawn from market, and other patents and contrivances for the manufacture of tobacco supplanted the Jones patents, and greatly depreciated their value.

II. That the market value of the said patents at the time of the said interference, to-wit: October 11th, 1878, was forty thousand dollars, and the market value thereof at the time

of making my former report, had depreciated two thirds, leaving the said patents worth the sum of thirteen thousand three hundred and thirty-three and $33\frac{1}{3}$-100 dollars.

III. That the *annual* profit derived from the manufacture and sale of machines at the time of the interference on October 11th, 1878, was six thousand dollars.

As conclusions of law, the referee ruled:

"*x*. That under finding 17 of my former report and finding "I," foregoing, the contracts between the plaintiff and defendants' intestate, R. W. Glenn, and defendant Call, were rescinded by the said action of defendant Call, and the said plaintiff and defendant Glenn are entitled to be put in *statu quo*.

"*y*. That the plaintiff and defendant Glenn are entitled to the sum of six thousand dollars per annum, as damages, from October 11th, 1878, to March 5th, 1883, the annual profit derived from the manufacture and sale of machines, with interest thereon from March 5th, 1883.

"*z*. That the plaintiff and defendant Glenn are entitled to twenty-six thousand six hundred and sixty-six and $66\frac{2}{3}$-100 dollars, as damages, for difference between market value of the said patents at the time of said interference, October 11th, 1878, and the time of making the former report, on March 5th, 1883."

Accompanying the report is the following account, based upon the former report and this amended report:

"JOHN L. JONES AND DEFENDANT GLENN,
IN ACCOUNT WITH MANFRED CALL:

1878.			
Oct. 11th.	To balance due Manfred Call this day as per former report		$11,072 52
	To interest on same to March 5th, 1883, 4 y'rs, 4 mos. and 24 days		2,923 14
1879.			
May 22d.	To amount paid for taxes		29 25
	To interest to March 5, 1883, 3 y'rs, 9 months and 13 days		6 63
May 22d.	To repairs on fence		14 16
	To interest to March 5, 1883		3 21
Nov. 5th.	To amount paid for insurance		200 00
	To interest on same to March 5th, 1883		39 80
			$14,288 71
1883.	CREDIT.		
March 5th.	By difference in market value of the said patents at the time of said interference and this date due to the plaintiff Jones and defendant Glenn, as damages	$26,666 66⅔	
March 5th.	By annual loss of profit on manufacture and sale of machines from Oct. 11, 1878, to date, 4 years, 4 months and 24 days, at $6,000.00 per annum	26,399 84	
	By Balance		38,777 79⅔
		$53,066 50⅔	$53,066 50⅔
1883.			
March 5th.	Balance due plaintiff, J. L. Jones, and defendant Glenn, subject to a note of $5,000.00 due Bank of Greensboro, with interest as specified therein from Sept. 16th, 1878, till paid, with interest thereon from this date		$38,777 79⅔

August 31st, 1885."

The defendant Call filed exceptions to each of the findings of fact, I, II and III, in the second report, as not warranted by the facts, and also to each of the referee's conclusions of law, *x*, *y* and *z*, as erroneous in law, and not supported by the facts, and also to the account filed, as based upon erroneous findings of facts and conclusions of law.

The defendant Call also filed as exceptions to the whole report, as amended, the exceptions filed to the original report, and which had been withdrawn by him when his motion was made for the confirmation of that report.

The action was tried before Clark, Judge, at the February Term, 1886, upon the report of the referee and the exceptions of the defendant Call, and all the exceptions filed to the original report of the referee were overruled, "for that the matter thereof had been adjudicated by Judge MacRae, and the exceptions had been heretofore offered by the defendant Call and withdrawn," and all the exceptions, including questions of fact and conclusions of law, arising on the amended report, were overruled, and judgment rendered against the defendant Call and in favor of the plaintiff Jones, and the defendant Glenn, among other things, for the sum of $30,827.59.

From this judgment the defendant Call appealed, assigning as errors:

1st. The exceptions taken to the rulings and judgment of the Court at Fall Term, 1883.

2d. The rulings and judgment of the Court at February Term, 1886; first, in refusing to consider the exceptions filed to the first report of the referee; second, in overruling the exceptions to the findings of fact by the referee in his second report; third, in refusing to consider the exceptions to the referee's conclusions of law, *x*, *y* and *z*, and the account as stated, because they were involved in the former adjudication made by Judge MacRae.

3d. In confirming the report of the referee and granting the judgment thereon in favor of plaintiff Jones and defendant Glenn.

Mr. John W. Graham, for the plaintiff.

Messrs. J. A. Barringer, L. M. Scott and *Walter Caldwell*, filed a brief for the defendant Call.

Mr. John Devereux, Jr., (*Mr. J. H. Dillard* was with him,) for the defendant Glenn.

DAVIS, J., (after stating the facts). The evidence is not sent up with the record, and we cannot consider the exceptions to the findings of fact, dependent upon the evidence.

The first exception for our consideration is to the judgment of the Court at Fall Term, 1883, re-referring the report to the referee, with directions, "in estimating the damages to the said Jones and Glenn, to consider the machines on the basis of a continued manufacture and sale, at the time of the interference, as set out in finding 17, and also the difference between the market value of the patents at the time of said interference, and the time of making his report, if he shall find that the difference in value, if any, was caused by said interference."

If there was error in the rule laid down by the Court for the guidance of the referee in this respect, then it must result that there was error in his findings of fact and conclusions of law, predicated upon the erroneous rule.

Finding 17 referred to is as follows:

"17. That the defendant Glenn and the plaintiff Jones complied with the stipulations of their said agreements, and were interfered with and stopped from the prosecution of their business and the manufacture of said machines, wrongfully and without cause, by the defendant, Manfred Call."

The referee finds as a fact, that at the time of interference, they had orders for one hand machine and five power ma-

chines; and that the usual average profits realized by them on a hand machine were $200, and on a power machine $300, and he allows $1,700 damages for the loss by reason of their failure to fill these orders. This loss could be ascertained with reasonable certainty, and was properly allowed, but to consider the loss of profit "on the basis of a continued manufacture and sale," from the time of interference, October 11th, 1878, to March 5th, 1883, is partly speculative. If a proper measure, why stop at the date of the report? Were the services of the parties of no value in other occupations during this long period? and if so, should they be considered? If they were making machines at the time of the interference, as the referee finds, at a profit at the rate of $6,000 per annum, what assurance was there that this would continue, or that they might not make them at a loss of $6,000 the subsequent year? As was said by counsel: "Who knows where they would have stopped, or what misfortune would have befallen them, or what other patents would have superseded this one, or whether they could by any possibility have made the same profits on machines, or would have made any?"

We are referred by counsel for the defendant Glenn, who makes this claim for damages jointly with the plaintiff Jones, to several authorities to sustain the rule of damages insisted upon by them, in which the facts are quite different, and which are distinguishable from this.

In *Masterton* v. *The Mayor of Brooklyn*, 7 Hill, 61, the plaintiffs had contracted for the price of $271,600, to be paid in divers sums, as the work progressed, to furnish certain marble to build a city hall. The plaintiffs thereupon made a contract with other parties, referring to the one entered into with the defendant, to furnish from their quarry the marble required for the erection of the building, in accordance with the terms agreed upon. They proceeded to deliver a considerable quantity of the marble, when the defendant

refused to receive any more, though the plaintiffs were ready to deliver it and perform their part of the contract. The contract was for the delivery of so much marble, and it was held that the plaintiffs were entitled to damages for the gains or profits which they would have realized from the performance of their contract.

That was a contract depending upon no contingency. It was known just how much marble was to be used; the price was fixed; and the value of the contract was not merely speculative, but capable of being ascertained with reasonable certainty—in fact, in that case, with absolute certainty.

In *Oldham* v. *Kerchner*, 79 N. C., 106, the plaintiffs were to grind a quantity of corn at a stipulated price per bushel, which the defendant contracted to deliver, but which he failed to do. Judge RODMAN, delivering the opinion of a majority of the Court, said: "We think it is now well established, that the profits which the plaintiff would have made, if the contract had been complied with, is the measure of damages for its breach, in cases like this. There are, of course, cases not within the rule, as where the profits are speculative and incapable of accurate ascertainment." That was a special contract by which the defendant agreed to pay eight cents per bushel for grinding the corn, (instead of the usual toll,) which was to be credited to the plaintiff on a debt which he owed the defendant. That case was unlike this, and does not apply, but the rule laid down in his dissenting opinion by the present Chief Justice, if not applicable to the facts of that case, is clearly applicable to this. He says: "Suppose the plaintiff had brought his action at once upon the defendant's repudiation of the contract, the damages, it would seem, must be estimated upon the same principle, as when he waits a year or more before doing it. In such case, the estimate must be purely speculative and conjectural, and the anticipated profits certainly could not be recovered. There are many contingencies attendant

upon all business—the possible loss by fire, the breaking of machinery, death, sickness, and other causes, may interrupt or suspend its prosecution. These cannot be estimated in advance, and profits must be largely dependent upon them. It is for this reason, that the actual, not conjectural loss, constitutes the plaintiff's claim to compensation." We think the authorities cited in the dissenting opinion apply to this case, and are conclusive.

In *Lewis* v. *Rountree*, 79 N. C., 122, the plaintiff contracted with the defendant for a certain number of barrels of rosin at a stipulated price. The defendant had notice that the plaintiff bought to ship and sell in a market other than that of the purchaser. The Court said: "For the purposes of the present question, the contract of the defendant may be regarded as a contract to deliver the rosin at any usual market, to be received by the purchaser, the purchaser taking on himself the risk, trouble and expense of the transportation." The market stated was New York, and it was held that the plaintiff had a right to recover what would have been his profits in New York, if the contract had been complied with. The contract was for a specified number of barrels at a stipulated price, and the measure of the profit or loss was the difference between the price to be paid, and the price at which the plaintiff could have sold in New York, deducting the costs, and this was capable of ascertainment with reasonable certainty, and the damages were not speculative. The same distinction will be found to mark the case of *Mace* v. *Ramsey*, 74 N. C., 11, in regard to the hire of the boat.

Without expressing any opinion as to the correctness of the rule laid down in the case of *Clements* v. *The State*, 77 N. C., 142, as applicable to the facts in that case, we think it has no application to this.

There was error in the rule of damages laid down by the Court, upon which the referee based his amended finding of

damages sustained by the plaintiff and defendant Glenn, by reason of the stoppage of the manufacture and sale of machines. The finding in the original report in this respect was correct, and the defendant's exception must be sustained as to so much of the order of re-reference as directs the referee to consider the loss of profit on the manufacture and sale of machinery, on the basis of a continued manufacture and sale, at the time of interference, as set out in finding 17. This also disposes of and sustains the exception to finding of fact "III," and conclusion of law "V," in the second report of the referee. The additional damages for loss of profits on manufacture and sale of machines from October 11th, 1878, to July 30th, 1883, amounting (as found by the referee) to $26,399.84, must be deducted from the account, and from the judgment, as rendered, for $30,827.59 ($30,827.59—$26,399.84,) reducing the amount in the judgment to the sum of $4,427.75.

The other exceptions depend upon the findings of facts and the conclusions of law thereon, based upon evidence not excepted to, and which is not before us for review, and we can see no error.

The judgment of the Court below must be modified to conform to this opinion. The costs of appeal must be paid by the plaintiff and defendants equally.

Modified.

*SAM'L H. PERRY v. W. T. ADAMS and wife.

Appeal—Transcript.

Where both parties appeal, a transcript of the record must be sent up by each appellant, and the appeals must be docketed separately, as distinct cases. This rule cannot be waived by consent of counsel, and unless it is done, the case will not be heard.

(*Devereux* v. *Burgwyn*, 11 Ired., 490; *Morrison* v. *Cornelius*, 63 N. C., 346; cited and approved).

CIVIL ACTION, tried before *Clark, Judge,* at January Term, 1886, of GRANVILLE Superior Court.

Both parties appealed from the judgment in the Court below, but only one transcript of the record, which contained the case stated on appeal of both appellants, was sent to this Court.

Messrs. John Devereux, Jr., E. C. Smith and *Jos. B. Batchelor,* for the plaintiff.

Mr. D. G. Fowle, for the defendants.

MERRIMON, J. In this case both the plaintiff and defendants appealed to this Court. The appeals are distinct—one is no part of, nor is it dependent upon the other in any respect, and the long settled rule of practice in such cases has been, that each appeal must come to this Court in fact—as it does in contemplation of law—separately, and separate transcripts of the record must be filed in this Court. The records of two such appeals are not wholly the same, nor is so much of the record as is peculiar to one, necessary to, or properly a part of that of the other. *Devereux* v. *Burgwyn*, 11 Ired., 490; *Morrison* v. *Cornelius*, 63 N. C., 346.

*JUSTICE DAVIS, having been of counsel, did not sit on the hearing of this case.

The purpose of the rule is, to prevent the confusion that would ordinarily result from blending two appeals—two distinct cases—in one, as to the cause of procedure and practice, and in respect to the allowance and taxing of the costs. The rule has been found necessary and wholesome, and must be upheld in all cases. It concerns the Court as well as litigants, and cannot be waived by consent of counsel.

In such cases, the clerk of the Superior Court must send up each appeal by itself, and hence, two distinct transcripts of so much of the record as applies to each.

In this case there is but one transcript. Whose is it? Is it that of the plaintiff or defendant? We decline to attempt to decide the questions intended to be presented for our decision, until the appeals shall be separated and each assigned its proper place on the docket, and to this end there must be a transcript for each.

Let the case be continued for this purpose. *It is so ordered.*

E. M. SHORT v. GEO. A. SPARROW and wife.

Certiorari—Agreement of Counsel.

1. This Court will not recognize any agreement of counsel, if disputed, unless it appears of record, or is reduced to writing and filed in the cause.
2. Where on an application for a *certiorari* the affidavits are conflicting, this Court will not undertake to settle the disputed facts.
3. Where an application for a *certiorari* does not assign any error in the judgment sought to be brought up for review, nor disclose any meritorious ground of appeal, the writ will be refused.

APPLICATION for a *certiorari* in *lieu* of an appeal, filed at February Term, 1887, of the Supreme Court.

SHORT *v.* SPARROW.

This action is pending in the Superior Court of Beaufort county, the object of it being the foreclosure of a mortgage executed by the defendants, Sparrow and wife, and the sale of the property embraced in said mortgage to pay the debt secured thereby.

It is alleged by the plaintiff that the defendants, Sparrow and wife, are insolvent; that the property included in the mortgage is not equal in value to the debt and interest secured thereby; that the interest has not been paid since June, 1885, nor have the taxes been paid by the defendants.

Upon a motion made in the cause for the appointment of a receiver, and continued and heard at Chambers, before Shipp, Judge, on the 15th of December, 1886, upon affidavits and counter-affidavits, G. Wilkins was appointed receiver to take charge of the property in controversy and rent it out, with the provisions that, "it is further ordered and adjudged, that upon the defendants, Sparrow and wife, executing a good bond to the plaintiff in the sum of $200, to cover the rents of said property, pending this suit, that they shall be allowed to remain in possession thereof."

From this order appointing a receiver, the defendants appealed, and this entry was made: "Appeal prayed and granted. Notice of appeal waived. Bond fixed at $50.00."

The appeal was not perfected, and this is a petition for a *certiorari* to have it brought up.

The defendant Sparrow files an affidavit, setting out at length the reason of his failure to perfect the appeal in time, which is, in substance, that on account of his sickness he was not able to attend to the matter, and there was an understanding and agreement with plaintiff's attorney that the time would be waived, and no advantage taken of the delay, and the subsequent refusal of the plaintiff's attorney to recognize this understanding and agreement.

To this affidavit, counter-affidavits are filed, one by the plaintiff, in which he denies absolutely that any further steps

were taken by the defendant to perfect the said appeal, after the entry of the grant of appeal and waiver of notice, or that there was any waiver of notice, or there was any waiver, either by himself or his attorney, of the statutory requirements necessary to perfect the appeal. Another affidavit, by E. S. Simmons and John H. Small, who made oath that they are and have been the only attorneys of record of the plaintiff, and they deny absolutely any understanding or agreement as alleged in plaintiff's affidavit, or that any conduct can be imputed to them, by which the defendants could have been misled or induced to neglect the requirements imposed by the statute in regard to appeals.

No counsel for the plaintiff.

Mr. D. G. Fowle, for the defendants.

DAVIS, J., (after stating the facts). This Court cannot undertake to decide between conflicting affidavits, nor will it depart from its well established and published rule, not to recognize any agreement of counsel unless the same shall appear in the record, or in writing filed in the cause. We cannot undertake to settle such disputed facts as are presented in this case. But aside from this, the defendant does not point out any error sought to be appealed from, or show any meritorious ground of appeal.

The application for the writ must be denied.

Denied.

HODGES BROS. et als. v. H. T. LASSITER et als.

Juror—Challenge—Evidence—Fraud.

1. Wherever the statute directs the County Commissioners not to include the names of a class of persons if drawn to serve on the jury in the panel, as in case of those having suits pending and at issue in the Superior Courts, it is a fundamental objection to the juror, whenever it is made to appear, and is a cause of challenge, although the County Commissioners may have allowed his name to go upon the *venire*.

2. *Quœre*, whether a juror who has an indictment pending and at issue against him in the Superior Court, is disqualified from serving on the jury by the statute which prohibits those having a *suit* so pending and at issue from serving.

3. In order to disqualify a juror from serving under this statute, the suit must be at issue, and so where an indictment was pending against a juror, to which he had never pleaded; *It was held*, that he was not disqualified under this statute, even if it applies to indictments.

4. In an action to attack a deed in trust to secure creditors for fraud, evidence of the amount of the trust property received by the trustee is immaterial and incompetent.

5. What constitutes fraud is a question of law; what is sufficient evidence of the facts required to establish it, is for the jury; and so if the fraud appears on the face of the instrument, it will be declared by the Court without the aid of the jury; but when dependent upon matters *dehors* the deed, it must be found by the jury.

6. Where in an action to attack a deed for fraud, *prima facie* evidence is given of the *bona fides* of the debt, the burden of proof is on the party attacking the deed to show the fraud, and evidence of such debts may be gathered from the plaintiff's own evidence.

7. If the purpose of a conveyance be to hinder and delay creditors, it is fraudulent and void, although the debts secured by it are *bona fide*.

(*Feimster* v. *McRorie*, 12 Ired., 287; cited and approved).

CIVIL ACTION, in the nature of a creditor's bill, tried before *Shipp, Judge*, and a jury, at Spring Term, 1885, of HERTFORD Superior Court.

On November 27th, 1878, H. T. Lassiter & Son, consisting of H. T. Lassiter and Walter T. Lassiter, and conducting a mercantile business in the town of Murfreesboro, becoming involved, and being unable to meet their liabilities, largely due in Baltimore, made an assignment of their entire stock of goods, notes, bonds, bills and credits of every kind, to James S. Whedbee and John S. Dickinson, partners of the firm name of Whedbee & Dickinson, in said city, in trust, to secure and provide for the payment of the sum of $12,000 due themselves, then of the sum of $2,000 due to James Carey & Co., and thereafter of all other outstanding claims against the assignors. The present action is instituted by creditors of the last class, to impeach the validity of the assignment, and charges that it was the result of a conspiracy between the parties to it, to hinder, delay, and defraud the other creditors, and such was the intent and purpose of the debtors, and this was known to and participated in by the trustees, to whose claim preference is given.

These imputations are denied in the answer, which asserts that the conveyance was *bona fide* made, and to provide for debts due and owing by the assignors. From these conflicting allegations a single issue was eliminated and submitted to the jury:

"Is the assignment made by Lassiter & Son to Whedbee & Dickinson fraudulent and void as to their creditors?"

To this the answer is, "No."

From the judgment rendered upon the verdict against the plaintiffs, they appeal.

Messrs. B. B. Winborne and *R. B. Peebles*, for the plaintiffs.
Messrs. D. A. Barnes and *W. D. Pruden*, for the defendants.

SMITH, C. J., (after stating the facts). This brief summary will enable us to proceed to the consideration and disposal of the exceptions found in the record.

1*st Exception.* One of the jurors of the regular panel was challenged by the plaintiffs upon the ground that he had a suit pending and at issue in the Court.

The following are the facts upon which the objection rests, as found by the Judge:

At Spring Term, 1884, a year before the trial, the juror and four others were indicted for an assault with a deadly weapon upon one Braxton Brown, and the prosecution had been since depending without any plea. On Tuesday of the present term, the indictment was disposed of by two of them submitting to a verdict of guilty, while a *nolle prosequi* was entered as to the other three, among whom was the juror. The Court being of opinion that the juror was competent, overruled the challenge for cause, and he was thereupon removed by a peremptory challenge of the plaintiffs. This, with three other peremptory challenges made afterwards, exhausted the number to which the plaintiffs were by law entitled.

The exception to this ruling raises the inquiry as to the proper construction of §1728 of *The Code*, which is in these words:

"If any of the jurors drawn have a *suit pending* and at issue in the Superior Court, the scrolls with their names must be returned into partition No. 1 of the jury box."

Primarily, this is a direction given to the County Commissioners when they proceed to draw the jurors, by a child not exceeding ten years of age, for regular service at the next term of the Superior Court held thereafter, as pointed out in the preceding section, but it must be deemed a fundamental disqualification in the juror, whenever it is made to appear. But is the present case within the terms of the statute? The word "*suit*," properly designates a civil proceeding in Court between parties, and while it may admit of more comprehensive import, is used in this connection in the more restricted sense. One accused of crime and prosecuted for

it, could hardly be said to "have a suit pending," while the language may be well applied to either party to a controversy which has found its way into Court to be there settled. If, however, all actions civil or criminal are included, as the mischief intended to be provided against is the same, no issue had been reached at the time, as no defence had been entered. The cause, though pending in the Superior Court, was not at issue, and consequently if it had been a civil action, it would not have rendered the juror incompetent.

Upon a similar enactment, we have found but two reported cases where its construction has been considered, and these do not meet the point of present inquiry.

In *Riley* v. *Bussel*, 1 Herskell (Tenn.), 294, six jurors were excepted to, as having suits in the Court, but not for trial at the term, and they were held to be incompetent. There were two enactments in the Code of that State, one forbidding the appointment of a juror who had a suit pending at the term, and the other disqualifying a juror and making it a cause of challenge, that the juror had a cause "*pending for trial*," and these were construed together in ascertaining the effect of the legislation.

In *Plummer* v. *The People*, 74 Ill., 361, the statute declared incompetent a juror who "is a party to a suit pending for trial" in that Court at that time. It was contended by the attorney for the people, that the disqualification did not attach, unless the trial took place at the time. It was ruled otherwise by the Court, and that it was only necessary that the juror should have a suit for trial, and it was immaterial whether it was in fact tried during the term. These jurors had civil actions in the Courts.

2*d*. The next exception arises out of the refusal of the Court to allow an inquiry to be put to a witness as to what the trustees had realized from the collection of credits. The objection to the proposed inquiry was, that it was not then appropriate, as the plaintiff's right to an account was not

denied, and that the condition of the trust fund would properly come up under a reference for an account, and this objection was sustained.

We are unable to see the pertinency of the information to an issue of fraud in the making of the assignment, which alone was before the jury, and we find no error in ruling out the evidence.

It was conceded that H. T. Lassiter & Son, the latter of whom has since died, were insolvent at the time the assignment was made

A series of letters passing between the parties to the deed of assignment, dated between November 14th, 1878, and December 10th of the same year, as well as other communications passing between the said trustees and their agent, sent out to take charge of the property after the conveyance, the last dated December 3d, were read in evidence by the plaintiffs, to sustain the charge of fraud, and they asked that the following instructions be given to the jury:

"1. That if the jury believe the evidence, they should find that the assignment of November 27th, 1878, from Lassiter & Son to Whedbee & Dickinson was intended to hinder and delay and defraud the creditors of H. T. Lassiter & Son."

The Court read the prayer in the presence of the jury, and said he could not give the instruction and refused it, and plaintiffs excepted.

"2. That in order to sustain said assignment, the defendants must satisfy you that the debt recited in the assignment, or a substantial part thereof, was actually due from Lassiter & Son to Whedbee & Dickinson, and there is no evidence to show that fact, and hence the jury should find that said assignment was without consideration and void as to the plaintiffs."

The Court refused this instruction, and told the jury that the law presumes the assignment of November 27th, 1878, to be honest, and imposes on the plaintiffs the burden of

proving the fraud they allege, by a preponderance of evidence, and unless the alleged fraud be so proven, the jury must find the issue in the negative; that as the defendants Whedbee & Dickinson went into possession of the property under the deed of assignment to them, and were in possession thereof at the time of the bringing of this action, the law presumes their possession to be rightful, and it is therefore necessary for the plaintiffs who allege fraud, to show it by a preponderance of evidence, and this extends to proving the alleged want of consideration. The plaintiffs excepted.

"3. That if the jury believe the evidence, as appears from the letters introduced and read, they should find that the assignment in question is fraudulent and void."

The instruction was refused and plaintiffs excepted.

I. As the question of the presence of an infecting element of fraudulent intent in making the assignment is one of fact, it was properly left to the jury to find upon the evidence, and to deduce from it. What constitutes fraud is matter of law; what is sufficient evidence of the facts required to establish it, is for the jury to find. When the fraud appears upon the face of the assignment, it is so declared by the Court; when dependent upon external proofs, it is to be found by the jury. The letters do not *per se* show this noxious element in the transaction, so as to avoid the conveyance, but they merely furnish evidence tending to show with what intent it was made, of the force and effect of which the jury must judge in arriving at a proper conclusion as to that intent.

II. The correctness of the response to the second prayer might well be questioned, if it rested upon the assumed fact that no proof whatever had been offered of the secured indebtedness, or of any considerable part of it.

In *Feimster* v. *McRorie*, 12 Ired., 287. to which we are referred in the brief of plaintiff's counsel, where the debtor conveyed so much of his entire estate as not to leave enough for his unsecured creditors, RUFFIN, C. J., declared that it

was "equally necessary that the trustee, in support of this deed should show the debts it proposes to secure, since the debts as a consideration, stand in this deed in the place of the pecuniary consideration in the other," referring to an absolute conveyance, in which the mere recital of the money paid as a consideration in the deed "would not be evidence as against purchasers or creditors, that any part of the purchase money was paid, but the bargainee would be obliged to prove the fact *aliunde*."

But assuming proof, not controverted, to have been given of the indebtedness, the burden then rests upon the plaintiffs, who allege, to prove the fraud.

The existence of the debts was shown in the letters introduced by the plaintiffs, and as part of their impeaching evidence. As no issue was made upon the point of the consideration, and evidence of it was furnished by the plaintiffs, the charge as to the party upon whom rests the burden, if erroneous, was harmless, and but the statement of a legal proposition inapplicable to the case. Moreover, the frame of the issue was manifestly intended to let in impeaching proofs to sustain the averments in the complaint, that, aside from the existence of the debts, the assignment was the fruit of a concerted fraudulent arrangement between the parties to it, and was thereby rendered void as to creditors.

III. The third instruction is essentially the same as the first, and must be similarly disposed of.

IV. The addition of the word "fraudulently" as qualifying the words following, "hinder and delay," do not change substantially the import of the instruction. If the essential purpose was to hinder and delay other creditors, and not to secure *bona fide* debts due, the hindering and delaying being but an incidental, though necessary result of such preferential trust, it would be a fraudulent hindering and delaying, and the presence of the word, if unnecessary, would not change

the legal import of the charge, while its absence might mislead the jury in passing upon the question before them.

In our opinion the case was fairly placed before the jury, and their verdict must stand.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

JOS. E. CARTER and wife v. L. C. WORRELL et als.

Wills—Legacy—Charge on Lands.

A will in one clause devised a tract of land to the testator's son W. In another clause a pecuniary legacy to a daughter was made an express charge on this land, and in the same clause another tract of land was devised to another son, C, and a pecuniary legacy to another daughter, I. This last legacy was not made an express charge on the land devised to C, but the will provided that the son C should manage the entire estate, including the land devised to C, until the legatees and devisees arrived at full age, and that he should pay the legacy to I by installments; *It was held*, that the legacy to I was a charge on the land devised to C.

CIVIL ACTION, tried before *Shipp, Judge*, at Fall Term, 1886, of HERTFORD Superior Court.

It appears that James A. Worrell died, leaving a last will and testament, which was duly proved, of which the following is a copy:

"*Item* 1. I leave unto my wife Harriet, enough land, including houses, for a one-horse crop. I also give her one horse and buggy, and what farming utensils she may need to carry on a crop, including household and kitchen furniture, during her natural life or widowhood.

"*Item* 2. I give unto my son Walter, all the lands north of the main road dividing my farm, to him and his heirs forever, after the death of his mother.

"*Item* 3. I give unto my son Charles all the land south side of the road, to him and his heirs forever.

"It is my request that the farm, with stock, &c., may all remain together, and to be worked in common for the support and maintenance of my two youngest children, Ida and Walter, and their mother, until they shall arrive at the years of accountability—that is, all that part of the farm on the north side of the road—and that a certain part be set aside each year, amounting to one thousand dollars, to give my daughter Mary Bishop, after taking out what I have already given her. It is my request that my son Charles shall have all the management of settlement of my estate, and to pay off the legacy above given to the best advantage; and that he also pay unto my daughter Ida five hundred dollars, after giving her a good English education, payable in installments as he may think best.

"My interest in mill and cotton gin, I give to my sons Charles and Walter in common, and for the free use of my wife Harriet and farm so long as she may live."

The *feme covert* plaintiff was the daughter Ida of the testator, to whom he gave the pecuniary legacy of $500, as specified in *Item* 3 of his will, as set forth above. Charles Worrell was his son, to whom he devised the tract of land in the same clause, and he is dead, and the defendants are his widow, (to whom he conveyed the land in his life-time,) his heirs at law, and the administrator of his estate.

The action is brought by the *feme covert* plaintiff to secure the legacy in her favor mentioned, and to have the same declared to be a charge and lien upon the land devised to her brother Charles, as above said.

The defendants contend that if any part of said legacy of $500 remains unpaid, it is not a charge exclusively upon

the lands devised to Charles, but it would be a charge either exclusively upon the lands devised to Walter, or that the share of Walter would have to contribute *pro rata* with the share of Charles in the payment of whatever amount, if any, may be due the plaintiff Ida Carter.

The jury having found that the legacy had not been paid, the Court gave judgment for the *feme* plaintiff, declared the legacy a charge upon the land devised to Charles, the son of the testator, and directed a sale thereof if need be, &c.

The defendants excepted and appealed to this Court.

Messrs. B. B. Winborne and *W. D. Pruden*, for the plaintiffs.
Mr. D. A. Barnes, for the defendants.

MERRIMON, J., (after stating the facts). The Court properly interpreted the provision in question of the will before us.

It is clear, we think, that the testator intended to give his land to his sons—one an infant and the other of full age—charged respectively with pecuniary lagacies in favor of their two sisters. That part of it situate on the north side of the road, which it seems made a covenant line of division, he devised to Walter "after the death of his mother," charged in the meantime with the common support of his widow and his two infant children, and with a legacy of one thousand dollars, subject to some indebtedness, in favor of Mary Bishop, a married daughter; that part situate south of the same road, he devised to Charles, charged with the legacy of five hundred dollars in question.

After thus devising his land to his sons respectively, by the second and third clauses of his will in explicit terms, he then directs that part of it devised to Walter, "that is, all that part of the farm on the north side of the road, be worked in common for the support and maintenance of my two youngest children, Ida and Walter, and their mother,

until they arrive at years of accountability;" and he further, in that connection, directs that a part of the earnings of the land—that is the reasonable import of the terms and their connection—"be set aside each year," to pay his daughter Mary Bishop, one thousand dollars, less such sums of money as he had given her. The testator thus showed a purpose to charge the land and in favor of the daughter named.

Having thus burdened the part of the land devised to Walter, he expresses the wish that his son Charles—his son of full age, it seems—"shall have all the management of settlement of my (his) estate, and pay off the legacy above given, (that to Mary Bishop,) to the best advantage." How to the "best advantage"? He directs that for that purpose, "a certain part be set aside each year"—that is, as is plainly implied by the connection in which these words are used—a certain part of the earnings of the land devised to Walter, after the death of his mother. It is pretty clear that the testator desired and intended—he so requested—that Charles should superintend and manage the part of the farm devised to Walter, certainly during the life of his mother, and perhaps until he and Ida should "arrive at the years of accountability." He could thus have fair opportunity, conveniently and "to the best advantage each year" to set aside a part of the earnings to pay the legacy in favor of Mary Bishop.

The testator then directs that Charles "also pay unto my daughter Ida, five hundred dollars, after giving her a good English education, payable in installments as he may think best." He does not in terms direct this legacy to be a charge upon Walter's part of the land during the life of his mother, or afterwards, as he had directed another legacy to be; he does not direct his executor to pay it; he does not direct it to be paid out of his estate generally, but he directs Charles to pay it. Why? The reasonable inference is, because he had given Charles the whole estate in the land lying south of the road mentioned, and one half of his interest in the

mill and cotton gin, the latter subject to the use of the same by the widow during her life-time. He intended that Charles should have the land charged with five hundred dollars in favor of his sister Ida.

This sum he was required to pay "in installments," as he might think best. This provision is not consistent with a purpose to have the legacy paid out of the personal estate. There is no direction that it should be paid out of the personal estate. Indeed, it does not appear from the will, that there was such estate out of which it might have been paid. The personal property, so far as appears from the will, except certain parts of it given to the widow, was to be kept and used on the farm to be cultivated for the support of the two youngest children and their mother, and the payment of the legacy to Mary Bishop.

The interpretation thus given, renders the several provisions of the will reasonably consistent, and gives effect to the general purpose of the testator to divide his land between his two sons. Judgment affirmed.

No error. Affirmed.

JOHN L. MOREHEAD v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Pleading—Issues—Parties—Stock—Attachment.

1. The lien of an attachment takes effect from its levy, and so, where in an action to compel a corporation to transfer certain stocks on its books, which the plaintiff had purchased at execution sale after it had been attached to answer the judgment, and the defendant answered that said stock had been transferred by the judgment debtor before the rendition of the judgment, but did not aver that such transfer was before the levy of the attachment; *It was held*, that the answer did not raise an issue, or set up a substantial defence.

2. Where the answer asks that new parties be made, this will not be done, when taking the answer as true; such party would have no ground on which to resist the plaintiff's claim.

3. *It is intimated*, that the purchaser of shares of an incorporated company, at a sale under an attachment against the party who appears on the stock-book of the corporation to be the owner, gets a title superior to that of a transferee from such apparent owner, who has not had the transfer made on the books of the corporation.

CIVIL ACTION, heard before *Shipp, Judge*, at Chambers, in Charlotte, on the 7th day of August, 1886.

Under an attachment issued in an action prosecuted by the present plaintiff and Julius A. Gray, in the Superior Court of Mecklenburg county, against William J. Best, and levied on seventy-five hundred shares, owned and held by him in the capital stock of the defendant company, the same was sold to the plaintiff for the sum of twenty cents per share, and the sheriff gave him a certificate therefor. This certificate, as evidence of the sale and the plaintiff's title to the stock, was deposited with the proper officers of the corporation, and a demand made for its transfer to the purchaser. This was refused, and the present action is for an order compelling the company to make the transfer of the stock on its books from the said Best to the plaintiff, and to issue a certificate of said shares to him as the owner thereof.

The answer admits the plaintiff's allegations, and by way of defence for the protection of the company, alleges, upon information and belief of its president, that before judgment was recovered in the action mentioned against said Best, he had assigned his stock to the Boston Construction Company, a corporation organized under the laws of Massachusetts. The grounds for this belief are, that one W. S. Denny, professing to be its treasurer in 1882, so informed the president of the defendant company; and that soon afterwards, the said Denny forwarded a paper in form, and purporting to

be a copy of the assignment, which paper has been lost, and after diligent search cannot be found.

The defendant insists that this claimant of the property should be brought before the Court, so that the ruling upon the question of the conflicting claims may be conclusive and binding upon both parties, and ensure protection to the defendant.

The cause was heard, we suppose by consent as no objection was made, before the Judge at Chambers, upon the case as made in the pleadings, and he finds as facts, besides the allegation in the complaint admitted in the answer, as follows:

I. That though the defendant alleges in its answer, that there was an assignment of said stock prior to the judgment, there was no evidence of any assignment whatever, either prior to the suing out of the attachment and its levy upon the same, or at any time.

II. There was no evidence of the existence of such corporation as the Boston Construction Company, or of any transfer of the stock of Best to any one; nor of the existence of such a man as Denny, said to be its treasurer; nor of any written transfer or copy of such by said Best, other than appears in the answer.

III. That as matter of law, the answer, in not averring the assignment to have been made before the levy of the attachment, fails to raise any material issue of fact requiring the intervention of a jury. Thereupon, it was considered and adjudged by the Court, that the plaintiff is entitled to the relief demanded, and the Court doth command and enjoin upon the defendant corporation, that it shall forthwith transfer to the plaintiff, upon the stock-book of the company, the seventy-five hundred shares of stock standing on the books in the name of Wm. J. Best, and forthwith to make, execute and deliver in proper form to said John L.

Morehead a certificate of stock for the said seventy-five hundred shares of stock.

From this judgment the defendant appealed.

Messrs. Jos. B. Batchelor and *John Devereux, Jr.*, (*Mr. R. D. Johnston* also filed a brief,) for the plaintiff.

Mr. Chas. M. Busbee, for the defendant.

SMITH, C. J., (after stating the facts). We concur in the opinion of the Court, that inasmuch as the *lien was formed by the levy of the attachment*, and the answer avers the assignment to have been made, not before that levy, but before the rendition of judgment, it does not in terms put in issue the superior title by assignment, and the plaintiff's paramount claim is consistent with the other, as subordinate. There was no reason therefore for delaying the cause by an effort to introduce into it a new party, whose very existence seems to be in doubt, and who, if there be such, so far as the answer speaks, could not controvert the plaintiff's demand with success. We are not prepared to admit, if the assignment supposed to have been made, was prior in time to the levy of the attachment, that it would be ground for arresting the progress of the action until the assignee could be brought in, for the proof of such fact shown by the defendant, would be a full answer to the plaintiff's action, as much so as if the new claimant had intervened and set up his own title, in an issue raised between the plaintiff and himself.

Certainly a person owning property in possession of another, cannot be stopped in pursuing and recovering it, because a party in whom the defendant alleges the property to be, is not introduced in the cause, inasmuch as the plaintiff must prove his own title, and proof of its being in some one else, would equally defeat his action. We have not therefore considered the point discussed in the brief, and which seems to be supported by the authorities referred to, that a

legal transfer of stock can only be effectuated by a transfer upon the books of the corporation by a surrender of the former, and the issue of a new certificate to the assignee. *Bank* v. *Watsonton*, 105 N. S., 222; and other cases cited in the brief.

The necessity of regarding as stockholders all whose names are on the corporation registry, until the change is made in the manner mentioned, arises from the fact that in this manner only can they be known, which could not be, if a transferred certificate alone had such effect. Such an assignment entitles the holder to have the transfer made effectual, and then, and not before, he becomes a legal owner, and entitled to all the rights of a stockholder.

There is no error, and the judgment must be affirmed, with costs againt the defendant.

Since the foregoing opinion was prepared, application has been made to the Court by motion of defendant's counsel, for an order remanding the cause to the Superior Court from which the appeal was taken, in order that a new party, claiming to be owner of 5820 shares of the stock purchased by the plaintiff, may be brought into the action and his title enquired into and concluded in the final judgment for the protection and security of the company. The motion is based on information received by the President of the defendant company, in a notice served on him by the claimant on February 12th, since the present session began, with a demand, that upon the surrender of the certificates which are enumerated, other certificates of the same amount be issued to him, the alleged assignee.

The notice and demand are not verified, nor so far as the affidavit discloses, is the time of the transfer given, other than by a statement founded on information and belief, that they were made prior to the lien of the attachment.

Without adverting to the suggestive fact of such long delay after the assignment, in giving notice to the company, and demanding the issue of new certificates, we decline granting the motion, for reasons sufficiently appearing in the opinion, and because no harm can come to the company by proceeding to determine the appeal. If the new claimant has a preferable right to the stock, it can still be asserted as before against the parties in the present action, which only determined the title as between the parties to it.

No error. Affirmed.

SAM'L M. WARD et als. v. CHAS. T. LOWNDES et als.

Sale of Land for Assets—Irregular Judgments—Infants—Guardians at litem—Fraud.

1. Where a Special Proceeding was brought to sell land for assets, in pursuance of orders in which the land was sold, but on account of grave irregularities in this proceeding, another was brought with the consent of the administrator and purchaser, to which the heirs were parties; *It was held*, that such second proceeding was sufficient to cure the irregularities in the first, and none of the parties thereto could be heard to complain of it.
2. Where proceedings were brought before the Probate Judge which should have been brought before the Clerk, and *vice versa*, the irregularity is cured by the statute (Bat. Rev., ch. 17, §§ 425, 426).
3. Infants may sue or be sued and are as much bound by the judgment as persons *sui juris*, but infants must sue by a next friend or guardian, and defend actions against them by a regular guardian, or if they have none in this State, by a guardian *ad litem*.
4. The provisions of the statute in regard to the appointment of guardians *ad litem* should be strictly observed, but mere irregularities in observing them, not affecting a substantial right, will not vitiate judgments and decrees obtained in the action or proceeding in which such irregularities exist.

5. Courts obtain jurisdiction over infant defendants over fourteen years old exactly in the same manner in which they do over adults, but if the infant is under fourteen, besides serving them personally and leaving a copy with them, a copy of the summons must also be delivered to the father, mother, or guardian, or if there is none in this State, then to the person who has the care and control of the infant, and in the case of non-resident infants, by publication as in other cases.

6. The judgments and decrees of a Court which has jurisdiction, although erroneous or irregular, cannot be attacked in a collateral proceeding. If erroneous, they must be corrected by appeal: if irregular, they must be set aside by a motion in the cause, made in a reasonable time.

7. The facts that the administrator who sold the land for assets was the law partner of the counsel who conducted the proceeding: that many of the orders in the proceeding were in the handwriting of the administrator: that the answer of the guardian *ad litem* was also in his handwriting, it appearing that the guardian had taken all necessary steps to protect his wards: and that one of the attorneys for the administrator bid off the land for the purchaser, do not constitute such constructive fraud as to vitiate the judgment, when it is found as a fact that there was no actual fraud.

8. A purchaser at a judicial sale, after he has paid the purchase money, may direct the commissioner to make title to another, and this furnishes no ground to set aside the order of sale.

(*Bell* v. *King*, 70 N. C., 330: *Hurdle* v. *Outlaw*, Ibid, 334: *Tate* v. *Mott*, 96 N. C., 19: *Grantham* v. *Kennedy*, 91 N. C., 148: *Williamson* v. *Hartman*, 92 N. C., 236: *Fowler* v. *Poor*, 93 N. C., 466: *Syme* v. *Trice*, 96 N. C., 243: *Smith* v. *Kelly*, 3 Murph., 506: *Shamberger* v. *Kennedy*, 1 Dev., 1: *Testerman* v. *Poe*, 2 Dev. & Bat., 103; *Campbell* v. *Baker*, 6 Jones, 255; cited and approved).

CIVIL ACTION, tried before *Avery*, *Judge*, at August Term, 1886, of BUNCOMBE Superior Court.

The plaintiffs, except Harry Marrigalt, are the legatees, devisees, and heirs at law of Joshua Ward, deceased, and brought this action only to recover the possession of the land described in the complaint.

The principal defendant, Charles T. Lowndes, in his answer, denied the material allegations of the complaint,

except that the plaintiffs were such heirs and devisees. He alleged as a matter of defence, that the said ancestor of the plaintiffs died insolvent, in the State of South Carolina, leaving a last will and testament, which was duly proven in that State, and a copy thereof, duly authenticated, was allowed, filed and recorded, according to law, in the county of Transylvania in this State, and the executrix therein named having renounced her right to qualify as such in this State, F. J. Whitmire was appointed administrator *cum testamento annexo* of the estate; that he obtained judgment against this administrator in the Superior Court of the county named, for the sum of $24,500.59, with interest thereon from the date of the judgment; that thereafter the administrator brought a Special Proceeding in the Court mentioned, to obtain a license to sell the land in question and other lands, to make assets to pay the debt named, and other debts of his testator; that under and in pursuance of orders and judgments in these proceedings, the lands were sold; the defendant purchased so much of the same as is now in controversy; the sale was confirmed; the purchase money was paid, and title, under his direction, was made to his wife, Sabina E. Lowndes; that these special proceedings were regular and effectual, and he was placed in possession of the lands about 1872, and has been in possession of the same ever since, &c., &c.

The plaintiffs, afterwards, by consent of parties, amended their complaint, reiterating that first filed, and alleged that the special proceeding mentioned and relied upon by the defendants in their answer, was fatally irregular, fraudulent, and absolutely void; that the present plaintiffs, devisees and heirs at law, were at the time of such proceedings infants of tender years; that they were not parties to them, in any just sense, or in contemplation of law, nor were they lawfully represented therein by any general guardian, or guardian *ad litem*, as allowed and required by law in such cases; that the

Court had no jurisdiction of them: that the supposed judgment was not such in law; that it was not a just one, as to the amount honestly due the defendant Lowndes, but was obtained by fraud and collusion between him and the administrator named, &c., &c.

The defendant answered the amended complaint, alleging the regularity, fairness, justness and validity of the proceedings mentioned, the justice and fairness of his judgment, the sale, the due application of the assets—the proceeds of the sale of the land leaving a large part of his, and much of other debts unpaid—the effectiveness of the orders, judgment, sale, &c., &c.

The following is so much of the case settled on appeal as is necessary to a proper understanding of the opinion of the Court:

"The following issues were submitted to the jury, resulting in the responses as indicated:

1. What are the plaintiffs' damages?

Answer—One hundred and twenty-five dollars per year—one thousand eight hundred and seventy-five dollars.

2. What would be the present value of the land in controversy without the permanent improvements made upon it by the defendants?

Answer—Eight thousand dollars.

3. What is the present value of the land in controversy, including the value of the permanent improvements?

Answer—Seventeen thousand dollars.

A trial by jury as to all other issues of fact was waived by the parties, and it was agreed that the Court should find all facts not found by the jury, and decide all other questions of fact and law involved in the controversy; thereupon, the Court finds the following facts:

1. On the 25th day of April, 1870, F. J. Whitmire, administrator with the will annexed of Joshua Ward, deceased,

instituted in the Superior Court of Transylvania county, a Special Proceeding for the sale of land for assets, against Constantia Ward, the widow, and Florence, Samuel Mortimer, and Joanna Ward, children, heirs at law and devisees of Joshua Ward.

2. The defendants in said proceeding were non-residents of this State, and resident in the city of Charleston, State of South Carolina; Florence and Joanna residing with their step-mother, Constantia Ward, and Samuel Mortimer with Rev. A. Toomer Porter, his testamentary guardian, as appears in the will, all being under fourteen years of age. Florence and Joanna had no testamentary or general guardian; but by the will of the said Joshua Ward, which had been admitted to probate both in North and South Carolina, the said Rev. A. Toomer Porter, also a resident of Charleston, South Carolina, was appointed guardian of Samuel Mortimer. It did not appear that any general guardian had been appointed for any of the infant defendants by any order or decree or judgment of any Court in North Carolina.

3. That Messrs. Bailey & Martin, attorneys at law, were the counsel for the administrator, and as such conducted this proceeding. Mr. Whitmire was a young lawyer, (having been a student of Messrs. Bailey & Martin,) residing in Transylvania county, and at one time, when and for how long does not appear, was associated in the practice in Transylvania county with Messrs. Bailey & Martin. Whitmire was dead at the time of the commencement of this action. The partnership between Messrs. Bailey & Martin was dissolved some time during the year 1870 or 1871, and before the institution of the proceedings herein after more particularly referred to, but in drawing many of the orders and decrees and report of sale in the second proceeding, Mr. Martin acted for the plaintiff Whitmire.

4. In the Summer or Fall of 1870, a Mr. Cheeseborough, a citizen of Buncombe county, received a letter from C. T.

Lowndes, stating that he had recovered a large judgment against Ward's estate, and requesting him, Cheeseborough, to purchase, if he could do so at a reasonable price, a tract of land in Buncombe county known as Rock Hall, which he understood was to be sold as a part of Ward's estate, to pay his debts. On receipt of this letter, Cheeseborough called upon Messrs. Bailey & Martin, and ascertained from them that the property in Transylvania county, now in controversy, as well as Rock Hall, was to be sold. That Cheeseborough then heard of the sale of this property for the first time. Cheeseborough instructed Mr. Martin, of Bailey & Martin, to bid in the Transylvania property for Mr. Lowndes. He then wrote Mr. Lowndes what he had done, and received his approval as to bidding it off.

5. At the sale on the 3d day of October, 1870, the bidding was lively, there being a good deal of competition, and the land was finally knocked down to C. T. Lowndes in the sum of six thousand five hundred and fifty dollars, Mr. Martin, of the firm of Bailey & Martin, bidding for him.

6. The estate of Joshua Ward was insolvent, there being then docketed against his administrator in Transylvania county, judgments amounting from twenty-seven thousand to thirty thousand dollars. Among them was a judgment in favor of C. T. Lowndes, founded upon a bond executed to Alexander Robertson on the 16th day of June, 1863, to secure the sum of sixteen thousand dollars, which said judgment amounted to twenty-four thousand five hundred dollars and fifty-five cents. This bond was given in satisfaction of the amount due from Joshua Ward to the firm of Robertson, Blacklock & Co., of Charleston, S. C., being the balance of his account with them up to the 16th day of June, 1863. This account showed a balance due from Ward, on June 30th, 1858, of $5,685.82; on the 30th of June, 1859, $9,737.32; on the 30th day of June, 1860, $12,286.74; on the

1st of November, 1862, $15,809.47; on the 1st of May, 1863, $15,615.47.

The complaint in this action was verified, and no answer was filed. The scale of Confederate money, established by law in South Carolina, was at the date of the bond $1 in gold to $5.13 in Confederate money; in North Carolina, $1 in gold to $6.15 in Confederate money. The summons was in Whitmire's handwriting; the body of the complaint in Mr. Martin's. Mr. Whitmire was the only resident lawyer at Brevard, the county seat of Transylvania county, and was often requested by the clerk to write for him, and to prepare papers requiring legal form, thus many of the orders in these proceedings were drawn by Mr. Whitmire at his (the clerk's) request.

7. On the coming in of Mrs. Ward's answer, and upon her request therein that Thomas L. Gash, Esq., be appointed guardian *ad litem* for Florence and Joanna Ward, the clerk of the Court applied to Mr. Gash to act as guardian *ad litem*. Mr. Gash was a gentleman of intelligence and character, and had frequently acted as deputy clerk. After some inquiry as to the nature of his duties, and having no knowledge of them, he consented to act, and was duly appointed and qualified. He then examined into the condition of the estate, corresponded with the said A. Toomer Porter, examined the judgments against Ward, and from these and other sources, satisfied himself that the estate was insolvent. He filed his answer, which, except the signature, was in the handwriting of Whitmire, the administrator, who was requested by him to put it in proper form. Mr. Gash's proceedings and actions in the matter, were done in good faith. He had never seen, did not know, and did not meet Mr. Lowndes until after the second sale.

8. After the sale of October 3d, 1870, and its confirmation, Judge Bailey, the senior member of the late firm of Bailey & Martin, having serious doubts as to whether the Superior

Court had jurisdiction of Special Proceedings to sell land, instituted another proceeding, returnable before the clerk of the Superior Court of Transylvania county, between the same parties except Constantia Ward, the widow, who had died in the meantime, and for the same purposes, a certified copy of which proceeding, marked Exhibit No. 2, was made a part of this finding.

The plaintiff objected to treating the foregoing exhibit as a transcript of the record, and insisted that the order appointing the guardian *ad litem*, purporting to have been made July 1, 1871, incorporated in said transcript, was incorrect. Plaintiffs, in order to show this, offered in evidence the Minute Docket of the clerk of the Superior Court of Transylvania county, in which an order marked Exhibit No. 3, is entered as the true order, instead of the order set forth in the certified record, known as Exhibit No. 2. J. R. Neill, clerk of the Court, testified that the original order made in the proceeding had been lost since Exhibit No. 2 was made out and certified to. The plaintiffs also offered a memorandum, admitted to be in the handwriting of the said Mr. J. G. Martin, and purporting to be a copy of a part of the record in the said proceedings, and insisted that it was apparent from comparing the memorandum with the certified copy, that the said order in Exhibit No. 2 was copied from said memorandum, and not from the original order. Mr. Neill testified that the said order incorporated in Exhibit No. 2 was copied from the original order on file in the papers. The order sent up as Exhibit No. 3 is identical in form with the order appointing the guardian in proceeding No. 1.

9. J. R. Neill, who was clerk of the Court testified that he had copies of the summons and petition duly deposited in the postoffice at Brevard, Transylvania county, on the 5th day of April, 1871, by O. L. Erwin, deputy clerk, addressed to the defendants at Charleston, S. C. It is insisted for the plaintiffs, that this evidence was contradictory of the affida-

vit of O. L. Erwin, which is incorporated in Exhibit No. 2. Porter, the guardian of Samuel M. Ward, received the copies addressed to him; whether the other parties received the copies addressed to them does not appear.

10. The proof of the service of the summons by publication in the North Carolina *Citizen*, was made, and was before the Court when the orders and decrees of July 1, 1871, were made.

11. At the sale under the decree of July 1st, 1871, made on the 5th day of August, 1871, the land was again bid off by Mr. Martin, for Mr. Lowndes, at the same bid as before, with interest added. The purchaser had been put in possession under the former sale, and he and they who claim under him, have been in continuous possession ever since. On the 13th day of January, 1872, the administrator, by the direction of Mr. Lowndes, conveyed the land to Mrs. Sabina Lowndes, the wife of the purchaser. No assignment of the bid appears of record, nor does it appear affirmatively that Lowndes assigned his bid in writing to his wife.

12. C. T. Lowndes was a resident of the city of Charleston, State of South Carolina, and was not present at either of the sales, or at the times when any of the orders and decrees in the proceedings were made, and was not in the county of Transylvania until after the last sale. He had no actual knowledge or notice that the answers of the guardian *ad litem* were in the handwriting of Mr. Whitmire. He was a man of good character. He is now dead, leaving a last will and testament, which has been admitted to probate in this State, a copy of which is appended, marked Exhibit C, and made a part of this finding.

13. Both sales of the land were fairly conducted, and the property brought a fair price. The purchase money was all paid before the making of the deed, and applied to the payment of the costs of administration, and the indebtedness of

Ward's estate *pro rata*, the share applicable to the Lowndes judgment being credited thereon, to-wit: $6,201.90.

14. The character of Messrs. Bailey & Martin was admitted to be very high.

15. That there was no actual or intentional fraud or collusion in the management and conduct of the said special proceedings, and sales thereunder.

Upon the foregoing facts the Court finds as conclusions of law:

1. That the defendants, having allowed testimony to be offered bearing upon the question of constructive fraud, can not object upon the final argument, that there is no sufficient allegation of fraud.

2. That upon the facts proved there is no constructive fraud shown.

3. That the irregularities pointed out in the complaint, and apparent in the record, have been cured by the statute.

4. That the purchaser under the decree of sale will be protected by the Court, and his rights acquired by his purchase will not be disturbed."

The Court gave judgment for the defendants, and the plaintiffs appealed to this Court.

Messrs. McCrady and *J. H. Merrimon*, for the plaintiffs.
Mr. Theodore F. Davidson, for the defendants.

MERRIMON, J., (after stating the facts). It is very apparent that the two special proceedings in question, in which the land in controversy was sold, were intended to serve the same purpose—that is, to effectuate the sale of the land of the testator of the plaintiff therein named, to make assets to pay debts of the testator.

Conceding irregularities—serious ones—in the first of them in order of time, the second was intended to cure these, and we think it had that effect, in most material respects. The

latter proceeding was competent for this purpose certainly, as the administrator *cum testamento annexo*, plaintiff in both of them, and the purchaser of the land at the sale of it in pursuance of orders in both, consented thereto, and the present plaintiffs were concluded by them, if they were parties defendant.

The plaintiff administrator in them and the purchaser at the sale of the land, cannot complain that there were two proceedings, because the former brought and was party plaintiff in both, and both he and the purchaser accepted—acted under and in pursuance of—orders and decrees therein, and were therefore concluded by them. The present plaintiffs cannot be heard to complain, because, if they were parties defendant in them, particularly the second one in order of time, as the Court decided they were, and they are concluded, having had their day in Court.

Any possible mistake or misapprehension in bringing these proceedings before the clerk, as Judge of Probate, or otherwise, when the same should have been brought in the Superior Court, or *vice versa*, cannot help the plaintiffs, because such mistakes and irregularities in that respect, in these and like proceedings, have been cured and made effectual by statute. (Acts 1870–'71, chap. 108, §1; Battle's Revisal, ch. 17, §§425, 426.) The validity of this statute has been settled by repeated decisions in this Court. *Bell* v. *King*, 70 N. C., 330; *Hurdle* v. *Outlaw*, Ibid., 334.

Infants—residents or non-residents of this State—like adult persons, may sue and be sued in its Courts in accordance with the prescribed methods of procedure, and judgments for or against them are just as effectual and binding upon them as in case of adult persons, unless otherwise provided by statute. *Tate* v. *Mott*, 96 N. C., 19.

They cannot, however, regularly prosecute actions or special proceedings without the aid of a general or testamentary guardian, if they have such in this State, and in the absence

of such, they must sue by their next friend. And so, also, when they are defendants, they must defend by their general or testamentary guardian, if they have them in this State—otherwise by a guardian *ad litem*, to be appointed by the Court as prescribed by the statute (*The Code*, §181). This statute should be strictly observed, but mere irregularities in observing its provisions, not affecting the substance of its purpose, do not necessarily vitiate the action or special proceeding, or proceedings in them. The substantial purpose of this statute is, to have infants, in proper cases, made parties defendant, have them make proper and just defence, and to have their rights protected, and to this end, to have guardians to make defence for them. They are not presumed to have sufficient intelligence and discretion to act for themselves—to care for and protect their rights of person and property. Hence the law has a tender regard for them, and the Court will see on all proper occasions, that they and their rights are duly protected in all judicial proceedings affecting them.

Courts must obtain jurisdiction of infant defendants just as if they were adults, except as to those under fourteen years of age. As to them, they must be served personally with the summons, by delivering a copy thereof, and the delivery of a copy thereof to the father, mother or guardian, or if there be none in the State, then to such person as may have the care or control of the infant sued. (*The Code*, §217, par. 2). And if the infant defendant be a non-resident, service of process upon him must be made by publication, as prescribed by the statute. (*The Code*, §§218, 219).

Now, in the first of the two special proceedings above mentioned, the infant defendants therein—the present plaintiffs—were not made parties defendant strictly as the statute directed.

First, they and their mother were named as defendants. The mother at the time of the bringing of the proceeding,

being a *feme sole*, accepted service of the summons and petition, and filed her answer therein. The testamentary guardian of Samuel M. Ward, one of the infant defendants therein—one of the present plaintiffs—likewise accepted service of the summons and petition for his ward, and filed his answer.

The other infant defendants therein—Joanna and Florence—two of the present plaintiffs, had no general or testamentary guardian in this State, but, at the suggestion of their mother, made in her answer, the Court appointed Thos. L. Gash to be their guardian *ad litem*. He therefore filed an answer for them. But there was no personal service of summons upon any of the infant defendants. They were non-residents, and no service of process by publication was made as to them.

The Court, nevertheless, made an order of sale, and the land in question was sold, and the sale confirmed. It may be, that the orders and judgments and the sale made in this proceeding, were rendered effective by subsequent curative statutes, but we need not so decide, because, afterwards, the administrator mentioned brought a second like special proceeding, as we have seen above, in which proper summonses were issued; the sheriff returned that the defendants were not to be found in his county; an order of service of process by publication was made, and publication was made.

The learned counsel for the apellants insisted on the argument, that the order of publication, the publication of notice, and the appointment of a guardian *ad litem* for the infant defendants in this proceeding, were irregular in several respects, and void. There may have been irregularities, but none such appear as, in our judgment, rendered the service by publication void. And moreover, and what is more important, the Court decided that service had been made by publication, and took jurisdiction of the defendants.

It is further decided, that a guardian *ad litem* for all the infant defendants had been appointed. This guardian was recognized by the Court as such, and he filed an answer for all the infant defendants.

It was certainly competent for the Court to make such decisions, although they might be erroneous, and such decisions would not be void; they could only be corrected in a proper way. Having so decided, and thus taken jurisdiction of the parties and subject matter of the proceeding, the Court proceeded to hear and determine the whole proceeding upon the merits, and made appropriate orders and decrees to accomplish its purpose. The purpose was accomplished and the proceeding ended.

The action of the Court may have been in some respects irregular; there may have been errors of law in its decisions, orders, decrees, and judgments, but these were not such as rendered the proceeding absolutely void. It remained operative and effectual until such irregularities and errors should be corrected in a proper proceeding for that purpose. This action is not a proper remedy to correct such errors. This could be done only by appeal from such orders and judgments in the proceeding, as an appeal lay from, taken at the proper time, or by a proceeding as a substitute for an appeal.

Nor is it a proper remedy to correct or take advantage of such irregularities. This could be done only by a proper motion for that purpose in the proceeding itself, made within a reasonable time. This is the settled course of procedure in such respects. *Grantham* v. *Kennedy*, 91 N. C., 148; *Williamson* v. *Hartman*, 92 N. C., 236; *Fowler* v. *Poor*, 93 N. C., 466; *Syme* v. *Trice*, *ante*, 243.

The plaintiffs allege very vaguely, that the special proceedings in question were fraudulent and void. It is, however, found as a fact, "that there was no actual fraud or collusion," and it was not contended on the argument before us,

that there was. The Court held, and we think properly, that there was no constructive fraud, as contended by the plaintiffs. The slight facts relied upon to prove it may have been some evidence of positive fraud, but they develope no such relations of parties, and acts done, and not done that ought to have been done, as constituted constructive fraud.

The counsel for the administrator was not the counsel of the defendants in the special proceedings, nor did they act, or profess to act, for them. The mere fact that Whitmire, the administrator—it seems for the convenience of the clerk—wrote the summons, cannot be held to be constructive fraud.

The purchaser of the land, Lowndes, directed the deed for it to be made to his wife, and the administrator did so make it. This is made a ground of objection by the plaintiffs. It seems to us to be wholly without merit. The purchase money was paid as required by the order of the Court, and the administrator was directed to make title to the purchaser. Why might he not make it to such person as the purchaser directed—to his wife? His power to convey to the purchaser was complete; the purchaser was entitled to have the deed made to him. Why not to have it made to such person as he might indicate? We can see no legal reason why he was not. It has been repeatedly held that the purchaser at such and like sales might "assign his bid," and the sheriff or commissioner charged to make the title, could make the same to the assignee. *Smith* v. *Kelley*, 3 Murph., 507; *Shamberger* v. *Kennedy*, 1 Dev. 1; *Testerman* v. *Poe*, 2 D. & B., 103; *Campbell* v. *Baker*, 6 Jones, 255.

This case has been elaborately and ably argued by the learned counsel for the appellants, but he has failed to satisfy us that we ought to accept the conclusions reached by him.

Our judgment is, that there is no error, and the judgment of the Court below must be affirmed.

No error. Affirmed.

WM. A. WALKER v. THE TOWN OF REIDSVILLE.

Municipal Corporations—Contributory Negligence.

1. Where a party is injured by the want of ordinary care and diligence in another, but the party injured does not use reasonable care and diligence himself, he cannot recover.
2. If the injured party, although not entirely free from fault, could not by ordinary care and prudence have avoided the danger caused by the careless and negligent conduct of the defendent, he can recover damages for the injury.
3. So, if the negligence of the defendant was the immediate cause of the injury, and that of the plaintiff was remote, such remote contributory negligence would not bar a recovery.
4. Where an excavation was allowed to remain open and unguarded in a town, which, however, was some distance from the sidewalk, and its existence and unprotected condition was well known to the plaintiff, who carelessly fell into it and was injured: *It was held*, that he could not recover.

(*Bunch* v. *Edenton*, 90 N. C., 431; *Morrison* v. *Cornelius*, 63 N. C., 346; *Manly* v. *The Railroad*, 74 N. C., 655; *Parker* v. *The Railroad*, 86 N. C., 221; *Murray* v. *The Railroad*, 93 N. C., 92; *Rigler* v. *The Railroad*, 94 N. C., 604; cited and approved).

CIVIL ACTION, tried before *Boykin, Judge*, and a jury, at January Term, 1887, of ROCKINGHAM Superior Court.

The defendant, a municipal corporation, caused to be excavated within its limits a deep and wide pit between West Market street and the east front of the town hall and market-house, which pit was not completed on the 24th of October, 1884. The edge thereof next to the market-house was fifteen feet from the front of this building, the edge of it next to the street mentioned was fifty-six feet from the sidewalk of the street next to it.

The plaintiff, in the night of the day above mentioned, fell into this pit and sustained serious bodily injury, and this action is brought by him to recover damages on that

account from the defendant, on the alleged ground, that its officers and agents negligently failed to properly guard the pit mentioned by lights, railings and barriers in the night time, &c.

The defendant alleged contributory negligence on the part of the plaintiff.

At the trial, the plaintiff having introduced all his evidence, the Court intimated the opinion that the plaintiff could not recover. Thereupon the plaintiff suffered a judgment of *nonsuit*, and appealed to this Court.

Mr. John W. Graham, for the plaintiff.

Messrs. Mebane and *Scott* filed a brief, for the defendant.

MERRIMON, J., (after stating the facts). Granting that the defendant was chargeable with negligence, in that its officers and agents failed to properly guard the pit mentioned by a proper railing, barriers, or otherwise, and that it would be answerable therefor in a proper case, we are of opinion that the plaintiff cannot recover in this action, because, accepting the evidence produced by him on the trial as true, in any proper view of it, he negligently and directly contributed to the injury because of which he complains.

It appears that the pit was of considerable length, width, and depth, and dangerous. There were barriers—indifferent ones—on the side of it next to the street, and at each end, but none on the side next to the market-house. Around it, and particularly in front of the market-house, was a public common open way, much used by persons going over it to and from the market-house and town hall. All the evidence bearing upon this point, went to prove that the plaintiff well knew of the pit and where it was. He had seen the workmen at work in it for ten days and more, and on the afternoon just before he fell into it. There was ample room for him to pass out of the market-house without going

near to the edge of the pit, and he did not pass out through the door he usually passed through in going to and from his business. He testified, that as he was going home to supper, he made his way through a crowd of persons in the aisle of the building, to the front door on the east, facing West Market street; that he walked on, not thinking where he was going, but looking down; fell in the pit and broke both bones of his leg; that his mind was absorbed in respect to a trip he expected to make that night, and he forgot the pit. This is the substance of the material parts of the testimony.

Now it is clear, that if the party injured by the want of ordinary care and diligence of another, carelessly and negligently fails to use reasonable care, prudence and diligence to avoid or prevent the injury of which he complains, and the negligence of both parties be the direct cause of it, the party injured contributes to it, and he cannot recover damages on that account. In that case, the party injured, in his own wrong, helped to bring the injury upon himself. In a just sense, he injured himself. The parties were mutually in default and at fault. No rule can be devised to determine how much of the damage is attributable to the one party and how much to the other.

A man shall not be encouraged to injure himself by his own negligence; and no more, when the damage he encounters was the result of the negligent act or default of another, than if the danger arose otherwise. He must be reasonably careful and diligent to protect himself from danger, no matter how it may arise. If he is not, and sustains injury as a consequence, the law will not compel compensation in damages on the part of him whose negligence gave rise to it.

If, however, the injured party, though not entirely free from fault, could not by ordinary care and prudence have avoided the danger, he might recover damages. Thus, if a person were walking along on the sidewalk of a street, and

should by mere accident stumble and fall into an open pit immediately along-side of the walk, he might recover damages, as was held in *Bunch* v. *Edenton*, 90 N. C., 431. And if the negligence were the immediate cause of the injury, and that of the plaintiff were remote—not happening at the time of the injury—damages might be recovered; and there may be other exceptions to the rule above stated, not necessary to be mentioned here. *Morrison* v. *Cornelius*, 63 N. C., 346; *Manly* v. *Railroad Company*, 74 N. C., 655; *Parker* v. *Railroad*, 86 N. C., 221; *Murray* v. *Railroad Company*, 93 N. C., 92; *Rigler* v. *Railroad Company*, 94 N. C., 604

Applying the rule of law stated above, it seems to us that there can be no reasonable question that the plaintiff himself negligently contributed to the severe injury of which he complains, and that his negligence was the direct, helping cause of it. He well knew of the pit; its dangerous character; where it was; and of the pass-way, fifteen feet broad, between it and the market-house, out of which he passed. He did not need to go near it at all—he went out of his usual way in doing so. He did not by mere accident fall into it as he passed along by it; he unnecessarily and carelessly walked into it! Although he no doubt suffered greatly, he is not excusable for forgetting it. A reasonably prudent and careful man would not forget the presence of such danger in his immediate neighborhood—one that he had seen and observed every day for more than a fortnight, and but a few hours before he received the hurt. He was bound to act upon his information, and use ordinary care and prudence in shielding and protecting himself from what he knew to be a menacing danger to every one who passed near it. He forgot, and failed to be careful at his peril, and in his own wrong. *Parker* v. *Railroad Company, supra; Railroad Company* v. *Houston*, 95 U. S., 697; Dill. on Mun. Corp., §789; Beach on Cont. Neg., 40. In *Bucker* v. *The Town of Covington*, 69 Ind., 33, it was held, that when a party knows of the

existence of an open cellar-way in a sidewalk, and attempts to pass the place in the night, he will be considered as taking the risk upon himself, even if he had forgotten the existence of the obstruction, and if he receives injuries from falling into such cellar-way, he is chargeable with contributory negligence, and cannot recover damages. There are many cases to the like effect. *Gribble* v. *Sioux City*, 38 Iowa, 390; *Wilson* v. *Charlestown*, 8 Allen, 137; *Gilman* v. *Deerfield*, 15 Gray, 577; *Moore* v. *Abbott*, 32 Me., 46.

There is no error, and the judgment of nonsuit must be affirmed.

No error. Affirmed.

ELIZABETH KRON et als. v. M. A. SMITH et als.

Contempt—Amendment—Costs.

1. Where in an action to recover land, the complaint alleged and the answer admitted that the defendant was in possession of the entire tract, but in fact the plaintiff was in possession of a portion of it, and upon a motion for a receiver, the defendant was allowed to retain possession of the entire tract upon filing a bond, which was done; *It was held*, that in a proceeding to attach the plaintiff for a contempt for trespasses on that portion of which he was in possession when the order was made, it was not error to allow the order appointing the receiver to be so modified as to only embrace the land actually occupied by the defendant.
2. In such case the defendant cannot complain that the costs of the contempt proceedings are divided between the parties.
3. Where disobedience to an order of the Court is plainly not wilful, a disavowal of any intent to disobey will purge the contempt.

(*Bond* v. *Bond*, 69 N. C., 97; cited and approved).

MOTION to attach the plaintiffs for contempt, heard by *Avery, Judge*, at Spring Term, 1886, of UNION Superior Court.

KRON *v.* SMITH.

In the month of August, 1882, the plaintiffs sued out a summons against the defendants, in an action to recover a tract of land of one hundred acres, whereon was a flour and corn mill, in possession of and operated by the defendants. Before the return Term, the plaintiffs applied for, and the motion having been continued, in December, obtained an order for the appointment of a receiver, who was invested with full authority as such, but was directed that if the defendants would give bond, with sureties to be approved by the clerk, to secure the payment of the annual rents and profits to the receiver, and meanwhile to keep the premises in repair, nor commit or permit to be committed waste thereon, then and in that case, the receiver was to allow defendants to keep possession of said property.

The receiver did not himself take possession of the land and mill, but allowed them to remain with the defendant Melissa, the other defendant being her tenant, on her giving the required security for an annual accounting of profits to the receiver under the order.

Subsequently the defendants moved for an attachment against the plaintiffs and others for contempt in disobeying the order, and trespassing upon the lands in dispute, on the hearing of which, and the counter-motion from plaintiffs to dismiss, the Court finds the following facts:

When the action was brought the plaintiffs were in actual possession of the portion of the Ashmore tract of land described in the complaint, on which the trespass by Dock Kron, A. Bruton and Silas Bruton, at the instance of plaintiffs, is alleged to have been committed, in defiance of the order of the Court giving the possession to the receiver, and the said plaintiffs have been continuously in possession of said portion of the tract described in the complaint up to the present time, and for ten years past, and have cultivated it, knowing it to be a part of said Ashmore tract. The counsel for the defendant and for the receiver insists, that

the order appointing the receiver applies to the whole Ashmore tract, as well as the portion in the actual possession of the plaintiffs when the action was brought, and now in the possession of said Dock Kron and A. and Silas Bruton as tenants of plaintiffs, as the portion of said tract then and now in the actual possession of the defendant.

Upon the foregoing facts it is ordered and adjudged by the Court:

1. That the order appointing a receiver be so modified and amended as to place in the custody of said receiver and the defendant receiving rents under him by permission of the Court, only such portion of the Ashmore tract, described in the complaint, as was in the possession of the defendant when the action was brought, and that the plaintiff be allowed to amend the complaint by alleging that the defendant is in possession, wrongfully withholding possession of a part of said tract described in the complaint, instead of the whole of said tract.

2. That the motion to attach the plaintiffs, A. and E. Kron, and the said Dock Kron, A. Bruton and Silas Bruton for contempt be refused.

3. That each of the parties to the action pay one half of the costs accruing by reason of and incident to the motion to attach for contempt.

From this judgment the defendants appealed.

Messrs. W. P. Bynum and *J. J. Vann*, for the plaintiffs.

Messrs. P. D. Walker and *D. A. Covington*, for the defendants.

SMITH, C. J., (after stating the facts). While it is true the complaint avers and the answer admits, in general terms, that the defendants were in possession of the entire tract, it is quite obvious the relief sought and meant to be given in the order of appointment was against the loss of what prof-

its would come into the hands of the defendants from their use and occupation. This is apparent from the provision, that upon giving the required security, the defendants were not to be disturbed, but allowed "to keep possession of said property." To avoid a literal interpretation of the terms of the order, and to put it in a form to give effect to the intention of the parties and of the Court, it was eminently proper to correct the order in the manner in which it was done, and thus place the acts charged upon the plaintiffs outside of the sphere of its proposed operation and scope Thus there was no disobedience, and no ground for the further proceedings against the plaintiffs and their associates, and the motion for attachment was necessarily denied. The proceeding was strictly punitory in its object, and if there had been a violation of the words of the order, in their strict sense, it was so obviously not wilful as to bring a disavowal of an intent to disobey within the ruling in *Bond* v. *Bond*, 69 N. C., 97.

As the decision was adverse to the application, and the accused parties acquitted of the charge, the costs would ordinarily be made to follow the result. Certainly no cause of complaint can be made when the defendants are adjudged to pay but half of the costs incurred. There is no error, and this will be certified.

No error. Affirmed.

ELIZABETH KRON et als. *v.* M. A. SMITH et al.

Amendment.

1. The distinguishing feature of the practice introduced by *The Code*, is to have actions tried on their real merits, and avert a failure of justice from some defect that can be remedied by amendment, without prejudice to the other party.

2. The Superior Court has the power to allow amendments at any time, either in the allegations of the complaint, or in making new parties, except where the proof establishes a case wholly different from that made in the pleadings, or where the amendment would change the subject matter of the action.

(*Henderson* v. *Graham*, 84 N. C., 496; *Carpenter* v. *Huffsteller*, 87 N. C., 203; *Grant* v. *Burgwyn*, 88 N. C., 95; *Gill* v. *Young*, 88 N. C., 58; *Robbins* v. *Harris*, at this Term; *Reynolds* v. *Smathers*, 87 N. C., 24; *Marsh* v. *Verble*, 79 N. C., 19; cited and approved).

MOTION to amend, by making new parties, heard before *Avery*, *Judge*, at Spring Term, 1886, of UNION Superior Court.

The present appeal is from another interlocutory order, for amending the pleadings by introducing one Dr. Kron as an associate plaintiff in the action, the record and the facts being the same, except in matters directly pertinent to the appeal, as in the appeal from the refusal of the Court to adjudge him and others in contempt.

The amendment became necessary because there was an outstanding term, of which two months were unexpired when the suit was begun, in the added plaintiff, a fact which seems to have been overlooked at the time, and thus the right of possession was not then in the plaintiff whose lessee the said Dr. Kron had become.

The motion to amend was made at Fall Term, 1884, and was acted on and allowed after the removal of the cause to the Superior Court of Union, on the terms of the payment by the plaintiffs of all the costs incurred up to and inclusive of the term when the motion was made, and their giving bond with sureties in the sum of two hundred dollars for the prosecution of the suit.

From this ruling the defendants appeal.

Messrs. W. P. Bynum and *J. J. Vann*, for the plaintiffs.

Messrs. P. D. Walker and *D. A. Covington*, for the defendants.

SMITH, C. J., (after stating the facts). Upon a reference to the pleadings it will be seen that the controversy arises out of conflicting claims of title to the land, the defendant Melissa, (the defendant Dennis being in possession as her tenant of a part of the premises,) claiming for herself and other tenants in common, asserting in them a superior and paramount title to that of the plaintiffs, and hence the subject matter in controversy remains unchanged by the amendment allowed. It falls strictly within the provision of *The Code*, §273, which declares that the Judge or Court may, before and after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, &c.

The essential and distinguishing feature of the new practice, is to bring causes to trial upon their merits, and avert a failure for some defect which can be remedied without prejudice to litigants, and is necessary to the prosecution of or the defence to the action.

It may be that amendments are too liberally allowed, and thus encouragement given to carelessness in the preparation of pleadings, but the exercise of the discretion confided, with its limits, to the Court, is not subject to our review, unless those limits are exceeded.

In regard to parties, the necessity for others often appearing only in the progress and development of the cause, there is greater reason for addition and change, and this is usually permitted, when the essential elements of the dispute remain, and the defence not taken away, against the pending or any new action which the plaintiff, if the amendment were denied, would have to resort to for relief.

The cases on this subject are numerous. A summons may be amended by the clerk affixing his signature; *Henderson* v. *Graham*, 84 N. C., 496. No amendment is permitted when the proof establishes a case wholly different from that made in the pleadings; *Carpenter* v. *Huffsteller*, 87 N. C., 203;

Grant v. *Burgwin*, 88 N. C., 95; or changing the subject matter of the suit; *Gill* v. *Young*, 88 N. C., 58; *Robbins* v. *Harris*, at this Term. A change of plaintiffs may be made; *Reynolds* v. *Smathers*, 87 N. C., 24; and this was allowed when the plaintiff claimed as assignee and could not prove the assignment, during the trial the assignor becoming a co-plaintiff, the substance of the action being the same. See also *Marsh* v. *Verble*, 79 N. C., 19, which case is decisive of the question of power, and, as then, so now, must the right to exercise it be sustained, and the more readily on the terms prescribed. It does not appear that any defences are taken away which could be set up in a new action commenced when the amendment was asked for, and it would be a reproach to the administration of the law, to deny to the Court the authority to allow it.

There is no error, and this opinion will be certified that the cause may proceed in the Court below.

No error. Affirmed.

M. A. SMITH et als. v. ELIZABETH KRON et als.

Evidence—Agency—Infants—Torts.

1. Where a preliminary question of fact arises, upon which the admissibility of evidence depends, the finding of the Judge cannot be reviewed on appeal, if there be any evidence to warrant it.

2. Before the acts and declarations of an alleged agent made and done in the absence of the defendant, the alleged principal, can be received in evidence, the trial Judge must find as a fact, that *prima facie* evidence of the agency has been offered, and his ruling upon this question of fact is beyond the reviewing power of the appellate Court.

3. An infant is liable both civilly and criminally for his torts, and in an action for damages, it is immaterial that the tort was committed by the direction of one having authority over the infant.

4. While infants are incapable of making a contract with an agent either express or implied, so as to bind them for his torts committed in pursuance of the agency; *it seems*, that an infant is liable for torts committed by his agent in the necessary prosecution of the business of the agency, under the maxim, *qui facit per alium, facit per se*.

(*Kron* v. *Cagle*, 1 Wins., 118; *Monroe* v. *Stutts*, 9 Ired., 49; *State* v. *Andrew*, Phil., 205; *State* v. *Davis*, 63 N. C., 578; *State* v. *Vann*, 82 N. C., 631; *State* v. *Sanders*, 84 N. C., 728; *State* v. *Efler*, 85 N. C., 585; *State* v. *Burgwyn*, 87 N. C., 572; *Ellison* v. *Rix*, 85 N. C., 77; *State* v. *Jackson*, 82 N. C., 565; *State* v. *Secrest*, 80 N. C., 450; *State* v. *Edwards*, 79 N. C., 648; *State* v. *Norton*, 1 Wins., 296; cited and approved).

CIVIL ACTION, tried before *Avery, Judge*, and a jury, at May Term, 1886, of UNION Superior Court.

This action, begun on March 6th, 1879, by the plaintiff Melissa Smith, as administratrix of Jane P. Doty, and with leave of the Court, prosecuted *in forma pauperis*, is prosecuted for the recovery of damages for trespasses committed by the defendants, F. J. Kron, Adelaide Kron and Elizabeth Kron, in the life-time of the intestate, upon a tract of land whereof it is alleged that she, as a tenant in common, was the owner of one fourth part, in mining gold thereon and converting it to their own use.

At Spring Term, 1881, leave was given to make Cordelia Weisenger a party plaintiff, and at Fall Term, 1882, the original plaintiff also became such in her capacity as administratrix of Caroline Adkins.

At Spring Term, 1884, the death of the defendant F. J. Kron being suggested, the action was allowed to abate as to him; and at the second term thereafter, by consent, it was ordered that a copy of the record of the action be removed for trial to the county of Union, in the Superior Court of which, at Spring Term, 1886, it was tried.

The complaint and answer put in evidence the title to the land, and the commission of the alleged trespasses, besides which the defendants set up as a bar to the suit the lapse of time since the acts complained of were done. The mining for gold and its removal were operations carried on between the years 1843 and 1849, under the direction and control of the deceased defendant, F. J. Kron, the father of the surviving defendants, and for whom the plaintiffs allege he was then exercising an agency. The defendant Adelaide, in giving her testimony, stated that she was born in 1828, and is older than her sister Elizabeth.

The stress in the plaintiff's case, as shown on the trial, lies in offered proof of agency in the father, so as to affect his daughters by what he said and did. That proof, with a view of letting in the acts and declarations of the alleged agent, was in substance this: A witness who, in 1843, worked on the land for gold under F. J. Kron, and paid him toll but never paid any to the defendants, once went to the house to weigh and divide the gold, and this was done in the defendant's presence.

Another witness who worked under the deceased in mining during 1847 and 1848, testified that he and his daughters on one occasion came upon the premises, and the former said to the witness in their hearing, "you are about the line; I brought my daughters with me to show them their line." He then went off with them, had some conversation in French, and returning added, "what is below the stump belongs to us; what is above belongs to some one else."

To another witness who had worked on the land for the deceased in the years 1847, 1848 and 1849, the deceased said that he had brought his daughters to show them their line and to divide the gold. The gold was divided in the shop, the defendants being outside, and there were cracks in the walls of the house. The parties then all went off together.

The plaintiff then introduced as a witness Adelaide Kron,

one of the defendants, who testified that she was the daughter of Dr. F. J. Kron, and knew the land in dispute by reputation; that she thinks she was on the land once with her father; that she does not recollect seeing the witness Reynolds, Beamon or Morris; she cannot tell whether Dr. Kron ever had the land worked or not; that Dr. Kron saw to everything for witness and her sister Elizabeth; and the land was said to belong to witness and her sister, but they did not set up claim to anything then; witness does not know whether Dr. Kron claimed it for them or not, nor how he claimed it, if at all. As it was said to belong to witness and her sister, witness reckons that Dr. Kron claimed it for her and her sister; that stands to reason. Witness does not know whether he got gold from that land or not; witness was there on a certain Sunday, and reckons that Dr. Kron attended to this land for her and her sister.

Upon cross-examination, the witness stated that she was never before examined as a witness in Court; that she was never on the land with her father except on a Sunday in the year 1845; that she was born in 1828, and is older than her sister Elizabeth; that at the time she went on the land with her father she was only 17 years old; that she did not take charge of any thing; that witness's father took charge of witness's business, but witness never authorized him to attend to any business for her; that witness never did know where the gold spoken of came from; that they had other gold mines that were worked.

Upon this evidence as showing a *prima facie* case of agency, the plaintiffs proposed to show declarations of the alleged agent made within the scope of the assumed authority, and in the absence of the defendants. The proof was, upon objection, ruled out, the Court being of opinion and so deciding, that a case of *prima facie* agency had not been established, so as to let in proof of the declarations of the deceased to bind the defendants; and further, that the de-

fendants being infants at the time, were not answerable for the torts of their alleged agent. Whereupon the plaintiffs suffered a nonsuit, and appealed.

Messrs. Platt D. Walker and *D. A. Covington*, for the plaintiffs.
Messrs. W. P. Bynum and *J. J. Vann*, for the defendants.

SMITH, C. J., (after stating the facts). The ruling disposes of the exception first taken to the refusal of the Court to permit proofs of the declarations of the deceased, "that he was holding and leasing the land by the authority of and as agent of the defendants," and equally incompetent was the case made out in the appeal in the case of *Doe on the demise of Adelaide and Elizabeth Kron* (the present defendants) v. *Benjamin Cagle*, reported in 1 Winston, 118.

The ruling of the Court upon the insufficiency of the evidence to show a *prima facie* agency, so as to let in proof of the acts and declarations of the alleged agent to the jury, a preliminary enquiry to be determined by the Judge, *Monroe* v. *Stutts*, 9 Ired., 49, and numerous other cases referred to under it in Tourgee's Digest of Cited Cases, is *upon a question of fact*, not of law, and is beyond the reviewing power of the appellate Court. Facts upon which the admissibility of evidence offered depends, must be ascertained and found by the Court, and the conclusions of the Judge, *if there be evidence*, stand upon the same footing as the finding of the jury upon issues of fact.

Thus the Court must determine whether confessions have proceeded from undue influence operating on the mind of the accused so as to induce him to make them, and the determination is conclusive, while what amounts to such influence is a matter of law; *State* v. *Andrew*, Phil., 205. The former is not reviewable; *State* v. *Davis*, 63 N. C., 578; *State* v. *Vann*, 82 N. C., 631; *State* v. *Sanders*, 84 N. C., 728; *State* v. *Efler*, 85 N. C., 585; *State* v. *Burgwyn*, 87 N. C., 572.

So is the sufficiency of the proof of a lost writing to let in secondary evidence of its contents; *Ellison* v. *Rix*, 85 N. C., 77.

The Court must decide, as in case of agency, if the proofs of a conspiracy are *prima facie*, so as to admit the declarations of one in pursuit of the common object against the others; *State* v. *Jackson*, 82 N. C., 565.

Upon the qualifications of an expert to give an opinion; *State* v. *Secrest*, 80 N. C., 450.

Upon the mental capacity of a child of tender years to give testimony; *State* v. *Edwards*, 79 N. C., 648.

Upon the presence of negro blood in the defendant under the former law, so as to render a witness possessing the same blood competent to testify in the case; *State* v. *Norton*, 1 Wins., 296.

These cases serve as illustrations of the proposition, that the finding of a preliminary fact, necessary to the admission of testimony, made by the Judge, is conclusive upon this Court.

The next exception, not necessary to be decided in disposing of the appeal, in view of the absence of any evidence to sustain it, is to the ruling that infants, not being able to make binding contracts, except for necessaries in a proper case, are incapable of forming such a relation with an agent as to render them liable for his torts, done in prosecuting the objects of the alleged agency. This is what we understand the ruling to be, and we give it our unqualified assent. Unquestionably an infant is responsible for his own torts civilly, and, when they constitute a crime or misdemeanor, criminally also; and this, when committed by direction of one having authority over him, so far at least as affects his responsibility in an action for damages. Cooley on Torts, 103 and following; 1 Ch. Pl., 76, 80; *Robbins* v. *Mount*, 4 Robt. (N. Y.), 553.

If the instruction goes beyond the liability growing out of and inseparable from the relation of principal and agent, formed by contract positive or implied, and protects the infant of sufficient intelligence and judgment from accountability for torts, involved and done in the necessary prosecution of the business of the agency and the attainment of its ends, we are not prepared to concur in its correctness in law. We do not see why the rule in such case, *qui facit per alium, facit per se*, does not apply. But, however this may be, the instruction was irrelevant and not hurtful to the appellants, for there was no evidence presenting a state of facts to which it was applicable. There is no error.

No error. Affirmed.

W. H. HAMILTON et al. v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Bill of Lading—Contract—Damages.

1. The bill of lading issued by a common carrier, only determines the conditions upon which the freight is to be transported after it passes under its control, and it does not abrogate or annul any contract made by the common carrier before it was issued in regard to receiving and forwarding the freight.
2. So where the agent of a railroad company agreed to have cars ready to receive freight and to forward it on a certain day, but the carrier failed to have the cars ready and to forward it, such contract is not abrogated by the terms of bill of lading issued when the freight was shipped on a subsequent day.
3. Where the carrier is informed of the special circumstances making it advantageous to the plaintiff to get his produce to a certain market on a certain day, and agrees to furnish cars to be loaded in time to be forwarded to such market by that day, which contract he fails to perform, the plaintiff is entitled to recover such special damages as

actually result from the failure to get the produce to the market on that day.

(*Lindley* v. *The Railroad*, 88 N. C., 547; cited and approved).

CIVIL ACTION, tried before *Graves*, *Judge*, and a jury, at Spring Term, 1886, of WATAUGA Superior Court.

The present action is prosecuted to obtain redress from the defendant company for an alleged breach of contract on its part, in refusing to receive at its station in Statesville, on Saturday, the 6th day of December, 1884, the day agreed on for the purpose, and thence transport, two car loads of cattle to Richmond, in Virginia, intended to be sold for beef in that market on the Monday following. The cattle were put in cars on the defendant's road on Monday, two days later, and conveyed and delivered in Richmond early on the morning of the next day. Compensation is demanded to cover the loss from diminished weight and impaired quality of the beef, by the needless putting the cattle in and taking them out of the cars on the day of the defendant's failure to transport; for the loss of the best market day in selling; and for the expenses incurred in keeping the cattle at both places.

The defendant denies that any contract was made other than that set out in the bill of lading annexed to the answer, which has been strictly performed, and that the attempt to have the cars loaded with the cattle and attached to the train on Saturday as it passed eastward, failed by reason of the plaintiff's own negligence and delay in loading and having them in readiness for the train of that day, which could not wait for this to be done, without hazarding the connection with the through train at Salisbury.

The bill of lading is in the following form:

"WESTERN NORTH CAROLINA RAILROAD.

"NOTICE!

"Live stock will not be taken at reduced rates given, but will be charged full rates, unless the shipper and agent execute the following contract for the shipment of live stock:

"STATESVILLE STATION, Dec. 8th, 1884.

"Received by the Western North Carolina Railroad Co., of Hamilton & Hardin, the following described live stock:

Consignee and Destination.	*Description Stock.*	*Weight.*
A. G. Robison,	1 Carload Cattle,	East.
Richmond, Va.	O. K. Load and Cont.	20,000
		East Car, 7,102

"Consigned as per margin, to be transported by the Western North Carolina Railroad Co. to freight station, Richmond, Va., ready to be delivered to the consignee or his order, to such company or carrier. If the same is to be forwarded beyond said station, whose line may be considered as part of the route to the destination of said stock, it being directly understood that the responsibility of the Western North Carolina Railroad Co. as carrier, shall cease at the aforesaid freight station when delivered or ready to be delivered to such owner, consignee or carrier, upon the following conditions, viz.:

"That whereas the Western North Carolina Railroad Company and connecting lines, transfer live stock only at certain tariff rates, except when in consideration of a reduced rate, the owner or shipper assumes certain risks specified below: Now in consideration of said railroad's agreeing to ship the above described live stock at the usual reduced rate of $45.00 per car load to Richmond, Va., and a free passage to the owner or his agent on the train with the stock, (if shipped in car load quantities,) the said owner and shipper does hereby assume and release the said railroads from all injury, loss or

damage or depreciation which the animal or animals or either of them, may suffer in consequence of either of them being weak, or escaping, or injuring itself, or themselves, or each other, or in consequence of overloading, heat, suffocation, fright, violence, and from all other damages incidental to railroad transportation, which shall not have been caused by fraud or gross negligence of said railroad companies. And it is further agreed, that the said owner and shipper is to load, transfer, and unload said stock, with the assistance of the companies' agents or agent, at his own risk; and it is further agreed, that while the companies' employés shall provide the owner or person in charge of the stock all proper facilities on train and at stations for taking care of the same, the business of the company shall not be delayed by the detention of trains to unload and reload stock for any cause whatever, but cars may be left at a station upon request of the person in charge of the same, to be forwarded by next freight train, if he so directs; and the said owner and shipper hereby agrees that said railroad company shall not be held liable for any damage or injury that may occur to said stock, during the time the same may remain unloaded, and cut off the cars as aforesaid, and in case said stock is kept over at any given point by the said owner or shipper or his agent, beyond a reasonable length of time for feeding and watering, subject always to local laws of any State through which it may pass while in transit, when this contract shall be held to be voidable at the option of these railroad companies or either of them, in which case such rates of freight may be imposed and collected by said companies as they or either of them may deem proper, not to exceed local rates to such points of detention.

It is further agreed and understood, that the presentation of this bill of lading shall be sufficient evidence of ownership to relieve and release these companies from all liability on account of every delivery, but shall not be held to ope-

rate against the rights of these companies to demand, if they elect, the identification of the party presenting the bill of lading, before the delivery of the said stock to him. And it is further agreed, that in case of accident to, or delay of train, from any cause whatsoever, the owner and shipper is to feed, water, and take proper care of stock at his own expense, or the company may do so at the expense of the owner. And it is further agreed, that the owner and shipper, or his agent or agents in charge of stock, shall ride upon the freight train on which the stock is transported, and that he does assume and release said railroad companies from all risk of personal injury while about or upon the trains of the companies. And it is further agreed, that should damage occur for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion or jack $200, for a horse or mule $100, cattle $20, other animals $15 each. And it is further agreed, that when stock is shipped in less quantities than a car load, the company's agent shall assess freight on the animal or animals at the following tariffs, and collect freight accordingly, regardless of what the actual freight may be, viz.: Horses, mules and horned animals, estimated at 1,000 pounds each, and value limited at $100 each; jacks, stallions and bulls estimated at 2,000 pounds each; hogs and calves may be estimated at 230 pounds each; hogs and calves in lots of five or more, estimated at 200 pounds each; sheep and lambs may be estimated at 115 pounds each; sheep and lambs in lots of five or more estimated at 100 pounds each.

And this agreement further witnesseth, that said owner and shipper has this day delivered to said company the live stock described above, to be transported on the conditions, stipulations and understandings above expressed, which have

been explained to, and are fully understood by, the owner and shipper. J. S. SCALES.

Name of person in charge: HAMILTON & HARDIN,
J. C. HARDIN. *Owners and Shippers.*

"*Instructions to Agents and Conductors.*—Agents will endorse on this contract, and copy name of person or persons, in charge of stock. When so entered, conductors of train carrying the stock, will recognize and pass the parties, but will not be recognized on any other train. The original contract, duly signed by shipper, must be given to the shipper of the stock, and a duplicate, signed and marked duplicate, sent to the General Claim Agent."

The following issues were submitted to the jury:

Did the defendant contract with the plaintiffs as alleged in the complaint? Answer—Yes.

2d. Did the defendant have knowledge of the object of the plaintiffs to have the cattle in Richmond, Va., on a particular day, as set out in the complaint? Answer—Yes.

3d. Did the defendant fail to comply with the contract as alleged? Answer—Yes.

4th. What damages, if any, have the plaintiffs sustained by reason of the failure of their agents to comply with the contract? Answer—Two hundred and fifty dollars.

5th. After the contract made between the parties as alleged in the complaint, could the defendant have shipped the cattle beyond the North Carolina line before Monday morning? Answer—Yes.

There was a judgment for the plaintiffs, and the defendant appealed.

Mr. E. C. Smith, for the plaintiffs.
Mr. C. M. Busbee, for the defendant.

SMITH, C. J., (after stating the facts). At the trial before the jury, the plaintiffs proposed, and after objection made

and overruled, were allowed to prove by the witness Hardin, that at the plaintiffs' instance he saw and applied to one Scales, an agent of the defendant at Statesville, for two cars to convey cattle to Richmond, as he wished to be present at the sales there on Monday, and was answered: "You know the rules of loading, and must be on time." That by daylight on Saturday morning, the next day after the interview, the cattle were at the chute or place of loading, but none of the company's servants were at the depot except the night-watchman; that with such assistance as he could get, the cars were pushed up, one car filled and the other nearly loaded when the train came; that the work of loading was hurried up, and the cattle all put in, when the train moved, and without any attempt to attach the two cars, proceeded on its way and left them; that the cattle were then taken from the cars and left over till Monday, when they were again put on the cars and carried to Richmond, reaching their destination early the next day.

The plaintiff Hardin testified to the same effect as to getting the cattle on the cars, moving them to the chute for that purpose, and, just as the loading was finished and the cars ready, the starting of the train without them. Both witnesses testified to the damages from the needless putting the stock in and taking them out of the cars, estimating the damages at from fifty cents to one dollar on each of the forty-nine animals sent.

The other damages claimed, were for expenses incurred by the delays at Statesville and Richmond before the next sale day (Friday) after their arrival.

The testimony of the agent Scales, a witness for the defendant, is, that he made no contract for the transportation of the cattle, except that contained in the bill of lading, and this was with the plantiff Hardin; that the witness Bledsoe came to his office on Friday, and asked for two stock cars, and witness said he had them; that Bledsoe remarked, "I will

have two car loads of stock to arrive this evening," not saying when or where he wanted them sent. That on the same day one car was pushed up to the chute and another near to it; that on Saturday morning, plaintiff Hardin came to witness and asked why his cattle were not sent. Witness inquired if his stock were loaded, and the reply was, "not quite," and witness then said "we never hold trains." That this was between 7 and 8 o'clock, and that the train from the west is due at 7 a. m., and usually waits three minutes, but this morning was delayed ten minutes. The engineer in charge of the train stated, that when he started, there were a dozen cattle still to be put in the car at the chute, one hundred yards off over the track; but if loaded, he could have attached the cars to the train in fifteen or twenty minutes, and if delayed twenty minutes, would have missed connection with the Richmond and Danville train at Salisbury.

The conductor testified, that the last of the cattle were being put in the car when the train pulled out, and that the latest moment the train could leave and not lose connection, would be 7:30. This is the substance of the evidence bearing upon the material matters in controversy, which are whether any contract was entered into before Monday, and if so, upon whom rests the blame for the omissson to convey the stock on the train of Saturday?

I. The facts in proof are, in our opinion, sufficient to warrant the finding that the defendant company did undertake to furnish the cars and transport the cattle on the Saturday following, which, if carried out in detail, would have been at the usual charge, if the reduced rate was accepted, put in the form of the bill of lading afterwards issued. But it was not less an agreement, though arrested in its incipiency, by the defendant's failure, if it can be properly attributed to it, to carry it out at the time fixed upon. The undertaking to have the cars in readiness for the stock, imposed an obligation to take the initiatory steps towards transportation,

which was broken by its omission or neglect. The duty of putting the cattle in the cars, devolved upon the plaintiffs; that of preparing and having them ready, on the company. If this were not so, no contract whatever would ever be formed until the issue of the bill of lading, while this only determines the conditions of the transportation after the cars pass under the control of the company or its agents. This instrument regulates the terms of the second or executed contract, of which no complaint is made, but the antecedent one, broken by the neglect to forward on the Saturday before, is not merged in the latter, and its consequences averted. Indeed, the written instrument is but the execution of a preliminary agreement resting in parol, and its consummation.

II. Was there such default on the defendant's part as to expose it to a claim for damages?

From the defendant's own agent, it appears that he was expecting the stock to arrive on Friday evening, and the cattle were there early the next morning, and no preparations seem to have been made by the company's agents to have the cars in readiness to receive them in time for the early train. They were, however, about loaded, (some testimony affirming that both cars were loaded,) when the train moved off. There was twenty minutes' time to spare then before it was necessary to leave to insure connection at Salisbury. How long it would be necessary to wait to connect the cars with the train and prepare the necessary papers, does not appear, and at least during this interval, no effort was made to accomplish the result. It was early in the morning, and the plaintiffs were early at their work. They appear to have been in no default, and it would seem that equal promptness on the part of the company's employees would have insured the transportation. At least the jury might reasonably infer so from the facts detailed, and thus

place the blame of miscarriage of the arrangement upon the defendant, and its servants.

This disposes of the alleged error in regard to the refusal of instructions requested upon the question of the existence and validity of the contract, and those only remain to be considered which relate to the measure of damages.

The controversy upon this inquiry, is confined to such as are claimed to result from the defendant's failure to have the cattle in Richmond on Monday, in time for the sales of that day, and a consequent loss of a favorable market. The extent of the loss is not shown in the evidence, and we must assume, if any damages were added on this account, they were in accordance with the proofs, and thus is drawn in question the charge of the Court as to the consideration and allowance of the claim for any.

Upon this point the instruction given is in these words: "If you find that Monday was a sale day, and the best sale day, when plaintiffs' beef-cattle could have been sold to the best advantage, and the plaintiffs wished their cattle to be in Richmond on that day, and this was *known to defendant, and was in view of both parties when the contract was made*, the plaintiffs would be entitled to have such special damages as actually result to them from these special circumstances."

This is in response to the defendant's prayer for an instruction, which proposed to limit the recovery to the difference in value of the cattle, (that is, in deterioration and change in the market, as we understand,) when they ought to have arrived according to the contract, and did arrive, whereof no proof had been given; and, secondly, that special damages for loss of a bargain are not recoverable, unless the carrier knew all the circumstances, and agreed to deliver at a day certain, and knew that Monday was sale day in Richmond.

The finding on the second issue, seems to cover the point, and brings home to the defendant's agent a knowledge of

the fact, and while the issue is in terms very general, no objection to its form was made as not presenting it to the jury.

The manner in which the jury were charged in regard to such additional damage, is in accord with the ruling in *Lindley* v. *R. & D. R. R. Co.*, 88 N. C., 547; and furnishes no cause of complaint to the appellant.

No error. Affirmed.

A. M. WILLEY v. THE NORFOLK SOUTHERN RAILROAD COMPANY.

Easement—User—Abandonment—Presumption—Railroads—Judge's Charge.

1. The continuous use of a road as of right, for the prescribed time, is evidence of the acquirement of the easement, and in the absence of other evidence it is conclusive.
2. Interruptions of the use of an easement when brought to the knowledge of the claimant, rebut the presumption of a grant, unless such interruptions are promptly contested by the claimant and the easement re-asserted.
3. Interruptions of the use after the lapse of the time which raises the presumption of a grant of the easement, furnish evidence of, but do not constitute of themselves an abandonment.
4. As the presumption of a grant will arise by an adversary and continuous use of an easement for twenty years, so a disuse occurring afterwards for the same length of time, will raise a presumption of a surrender or extinction of the easement in favor of the servient tenement.
5. Where the plaintiff had a right to use a road which ran over the right of way of a railroad corporation, the corporation has no right to obstruct such road, when such obstructions were not necessary for purposes of the corporation.
6. Exceptions to the Judge's charge and prayers for special instructions must be made before verdict.

7. Where the appellant excepted to the Judge's charge on the question of damages, but did not point out what he considered to be the error, and did not ask for any special instruction: *It was held*, that the judgment would be affirmed, if the charge contained no intrinsic error, although it was not as full as it might have been.

(*Brown* v. *Morris*, 4 D. & B., 429; *Ward* v. *Herrin*, 4 Jones, 23; *Moore* v. *Hill*, 85 N. C., 218; *Strickland* v. *Draughan*, 88 N. C., 315; *Clements* v. *Rogers*, 95 N. C., 248; *Morgan* v. *Lewis*, 95 N. C., 296; *Tayloe* v. *The Steamship Co.*, 88 N. C., 15; *State* v. *Hardie*, 83 N. C., 619; *State* v. *Nicholson*, 85 N. C., 548; cited and approved).

CIVIL ACTION, heard before *Shipp, Judge*, and a jury, at Fall Term, 1886, of CURRITUCK Superior Court.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

The facts appear in the opinion.

Mr. W. J. Griffin, for the plaintiff.

Messrs. L. D. Starke and *W. D. Pruden*, for the defendant.

SMITH, C. J. In the construction of its road, the defendant company instituted proceedings against John B. Bell, and caused to be condemned a portion of his land in Currituck county, on which it constructed its track, of the width of thirty-three feet on each side thereof. Over this condemned land, and across the railway, passes a road or way, which the plaintiff claims as incident to a tract of land which he purchased in 1880, from long and adversary use, as of right, by the successive proprietors who preceded him.

The action is to recover damages for its obstruction by the company in erecting bars across the way, to prevent the incursion of stock into lands in cultivation, and this the company insists it has a right to do, as the bars were upon the condemned land, and they were necessary for the protection of unenclosed crops exposed to depredations.

There was much evidence, from user for a long period, in support of the claimed easement, and it was in proof that

the bars were cut down by the plaintiff, several times replaced by the company, and as often cut down again by the plaintiff, before bringing his action. This, with the inconvenience and delay produced by the obstruction, was the damage alleged in the complaint. It was shown also that the said John B. Bell had put a gate across the lane seven or eight years before the trial, and kept it up for some time.

There was no objection to the charge of the Court as to the manner in which the right of way or easement could legally be acquired from user, and superimposed as a servitude upon land of another. The defendant counsel requested the Court to give two instructions to the jury, which will be separately stated and considered:

I. If the plaintiff knew that Bell put the obstructions across the way, as testified to, and permitted them to remain there seven or eight years, this was an abandonment of the claim to an easement, and the plaintiff has no cause of action.

The Court refused to give the instructions, and we think rightfully. The continuous use of the road for the prescribed period as of right, was evidence of the acquirement of the easement, and unopposed, conclusive evidence. Interruption of the use, unless when known, promptly resented and the user re-asserted, rebuts the presumption of the grant. Interruptions after the lapse of the time which raises the presumption, furnish evidence of an abandonment to be considered by the jury, but do not constitute in law an abandonment. As the presumption of a grant arises from adversary and continuous use after twenty years, so the same period of disuse occurring afterwards, presumes a surrender or extinction of the incumbrance upon the servient land.

II. If the plaintiff has a right to the easement, the defendant could lawfully erect the bars upon its own acquired land, without being answerable in damages therefor to him.

The Court, in answer to this request, charged that if "the bars were necessary, (for the purposes of the road, as we

understand the meaning to be, in its own operations,) the defendant would not be liable; if unnecessary it would be, and this was for the jury to decide."

This direction was quite as favorable as the appellant could ask in its behalf, and gives it no just cause of complaint.

III. The charge as to damages was as follows: "The jury had heard the evidence, and it was for them to say what damages, if any, the plaintiff had sustained. It was a question of fact to be determined upon the evidence."

Defendant's counsel excepted to the instruction, (the record does not show whether before or after the verdict,) for "that it failed to lay down a proper legal rule for the guidance of the jury in ascertaining the damage, and because it left the question to the uninstructed discretion of the jury."

We have had some hesitancy in disposing of this exception, for it is distinctly taken to the charge. But in it there is no intrinsic error, and literally interpreted, it confines the inquiry to actual, as distinguished from punitory or speculative damages. But if not sufficiently explicit and plain in designating the rule by which they are to be measured, it was the duty of the appellant to ask an instruction, put in a form to advise the Judge of what was demanded. With a suggestion of this kind before him, he might have complied with the request, and if he did not, the refusal would admit of its being assigned for error. This was at least due to the Judge, so that he might advisedly act in the premises. The rule of practice is too well settled to require any reasoning in its defence. We refer to some of the cases. *Brown* v. *Morris*, 4 D. & B., 429; *Ward* v. *Herrin*, 4 Jones, 23; *Moore* v. *Hill*, 85 N. C., 218; *Strickland* v. *Draughan*, 88 N. C., 315; *Clements* v. *Rogers*, 95 N. C., 248; *Morgan* v. *Lewis*, Ibid., 296. And this should be before verdict. *Tayloe* v. *Steamship Co.*, 88 N. C., 15. See also *State* v. *Hardie*, 83 N. C., 619; *State* v. *Nicholson*, 85 N. C., 548.

The judgment must be affirmed.

No error. Affirmed.

C. B. JUSTICE v. THE CAROLINA CENTRAL RAILROAD COMPANY.

Appeal—Assignment of Errors.

Where no errors are assigned, and none appear upon the face of the record, the judgment will be affirmed.

(*Lytle* v. *Lytle*, 94 N. C., 523; cited and approved).

MOTION by the defendant appellee to affirm the judgment below, made at February Term, 1887, of the Supreme Court.

Mr. Theo. F. Davidson, for the plaintiff.
Messrs. W. P. Bynum and E. C. Smith, for the defendant.

DAVIS, J. The defendant appellee moves the Court to affirm the judgment rendered in the Court below, upon the ground that no exceptions were taken and no errors assigned for consideration and review by this Court.

No errors are pointed out or assigned in the record, and upon a careful examination we can find none.

We call the attention of the profession to the suggestion of MERRIMON, Judge, in the case of *Lytle* v. *Lytle*, 94 N. C., 523, in regard to appeals, and to rule 7, to be found in 92 N. C., 847.

In this case the judgment below must be affirmed. Let this be certified.

Affirmed.

JOHN GLENN, Trustee, v. M. M. ORR.

Corporation—Evidence.

1. Before the records and books of a corporation can be received in evidence for any purpose, it must be admitted or proved, that the entries were made by an authorized servant or agent of the corporation.
2. The records and books of a corporation are at the least *prima facie* evidence of the organization and existence of the corporation.
3. Where the stock-book of a corporation contained a list of the stockholders, the number of shares of stock owned by each, the sum of money paid by each, and the balance due, such book is evidence against a stockholder in an action to recover the unpaid balance of his subscription, to show that he was a stockholder, and the condition of his stock account, but such evidence may be rebutted.

(*Turnpike Co.* v. *McCarson*, 1 Dev. & Bat., 306; cited and approved).

CIVIL ACTION, tried before *Avery, Judge*, and a jury, at Spring Term, 1886, of MECKLENBURG Superior Court.

The action was instituted to recover of the defendant the unpaid balance due from him for subscription to the capital stock of The National Express and Transportation Company, an insolvent corporation, of which the plaintiff had been appointed the trustee and receiver.

It became material on the trial, to prove the organization of the National Express and Transportation Company, and the appellant offered in evidence for this and other purposes, the records, books and minutes of that company, embracing what purported to be the proceedings in the organization of it, under and in pursuance of its charter. The appellee objecting, the Court held that these records were not evidence for such purpose, and the appellant assigns this ruling as error.

It likewise became material to prove, that the appellee was a subscriber for ten shares of the capital stock of the

company named, charged and credited to his account as a stockholder thereof, and the appellant offered in evidence for this purpose, the same records, which purported to show that the appellee did subscribe, and was a subscriber for the number of shares of stock mentioned; that he had paid $50 on account of the same, and the balance of the money due therefor had not been paid, and that he was a stockholder of the company. The appellee objecting, the Court declined to allow the records so offered to be put in evidence for such purpose, and the appellant assigns the rejection of the records as error.

In view of the adverse rulings, the appellant suffered a judgment of nonsuit, and appealed to this Court.

Messrs. Armistead Jones and *W. W. Flemming*, for the plaintiff.

Mr. W. P. Bynum, for the defendant.

MERRIMON, J., (after stating the facts). It was admitted on the trial, that the books and records offered in evidence, were those of the National Express and Transportation Company, and it must be taken from such admission, as there is no suggestion to the contrary, that the proceedings entered in them, and the orders and statements therein made, are regular, and made by the proper clerk, secretary or agent of the company, or some person authorized to make them. It must so appear, before such records and books can be received as evidence for any purpose.

The records and books thus identified, were evidence—certainly *prima facie* evidence—of the organization and existence of the company. They purport to set forth the proceedings of the organization, a list of the names of the stockholders, the number of shares of stock owned by each, when he subscribed for the same, the sum of money paid by each for his stock, and the sums due therefor remaining unpaid, and an account of its business transactions.

In *Turnpike Company* v. *McCarson*, 1 D. & B., 306, Chief Justice RUFFIN said: "The case does not state the contents of the subscription and corporation books that were produced, and therefore we cannot say positively of what they were evidence. We suppose them to be entries of such acts as the charter prescribed, as no deviation is specified. If so, those documents when identified, were not only evidence, but complete evidence of the organization and existence of the corporation." The rule is so stated in Ang & Ames on Corp., §§513, 514, 679; and so also, *Turnpike Co.* v. *McKeon*, 10 Johns., 154; *Gray* v. *Turnpike Co.*, 4 Rand (Va.) R., 578; *Owings* v. *Speed*, 5 Wheat., 420.

The books of the corporation offered in evidence, including the stock-book purported to contain, as we have seen, a list of all its stockholders; the number of shares of stock owned by each; the sum of money paid, and the balance still due from each on account of his stock, and the name of the appellee appears as a stockholder, and his account is stated, showing a balance due from him for his stock.

These books were competent evidence to prove that the appellee was a stockholder, and the state of his account as such, in respect to his stock. It was so decided in the similar case of *Turnbull* v. *Payson*, 95 U. S., 418, in which the Court say: "Where the name of an individual appears as a stockholder, the *prima facie* presumption is, that he is the owner of the stock, in a case where there is nothing to rebut the presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant." See also *Hamilton, &c., Plankroad Co.*, v. *Rice*, 7 Barb., 157; *Coffin* v. *Collins*, 17 Me., 440; *Whitman* v. *The Granite Church*, 24 Me., 236; *Wood* v. *Railroad Co.*, 32 Ga., 273; *Hoogland* v. *Bell*, 36 Barb., 57; Morawetz on Pr. Corp., §270.

The rule of evidence underlying this and similar decisions, seems to be founded in convenience, and to rest upon

the further ground, that corporations in this country are the creatures of statute, with prescribed rights and powers, subject to an important extent, to public control and supervision, and are therefore presumed to exercise their powers as allowed and required by law, and to keep their records properly and truly. Such presumption may, of course, be rebutted, by any competent evidence. This rule might in possible cases work injury to a party, but this is not probable, and though objected to on this ground, it has the less weight, as generally every litigant has the right to testify in his own behalf. *Turnpike* v. *McKeon*, *supra*; *Owings* v. *Speed*, *supra*.

There is error, and the appellant is entitled to have a new trial.

To that end, let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. Reversed.

STATE ex rel. J. J. CLENDENIN, Adm'r, &c., v. BENJ. TURNER et als.

Amendment—Parties.

1. The cause of action must exist at the time the action was begun, and the plaintiff will not be allowed by an amendment, to introduce a cause of action which had no existence when the summons was issued.

2. The Court has no power, except by consent, to allow amendments either in respect to parties or the cause of action, which will make substantially a new action, as this would not be to allow an amendment, but to substitute a new action for the one pending.

(*Grant* v. *Burgwyn*, 88 N. C., 95; *Merrill* v. *Merrill*, 92 N. C., 657; *McNair* v. *Com'rs*, 93 N. C., 364; *Ely* v. *Early*, 94 N. C., 1: cited and approved).

CLENDENIN *v.* TURNER.

CIVIL ACTION, tried before *Boykin, Judge*, at November Term, 1886, of IREDELL Superior Court.

It appears that on the 16th day of November, 1858, Benjamin Turner was appointed to be the guardian of his infant daughter, M. D. Turner, and executed his bond as such guardian in the sum of $3,200, with J. R. B. Adams and H. Nichols as sureties thereto; and on the 19th day of May, 1863, he executed his second bond as such guardian, in the sum of $10,000, with Henry Turner and A. P. Sharpe as sureties thereto.

Afterwards, on the 21st of August, 1866, the guardian above mentioned was removed by order of Court, and on the same day J. M. Turner was appointed such guardian in his stead, and gave his bond as such, in the sum of $3,500, with Henry Turner and Martin Gaither as sureties thereto.

Afterwards, on the 23d day of October, 1871, Benjamin, the first above named guardian, paid to his successor guardian above named, for his said ward, $1,656.30, and never paid him any other sum of money or other thing on her account.

The ward, M. D. Turner, intermarried with Harry Burke on the 4th of March, 1875, and she attained her majority on the 7th of March, 1877.

She and her husband brought an action on the 27th of October, 1877, against her second and last named guardian and the sureties upon his guardian bond, alleging breaches of the conditions thereof, and at the August Term, 1884, of the Superior Court of the county of Iredell, she obtained a judgment in that action for $3,500, with interest from the 11th day of August, 1884, and for $163.00 costs. Of this judgment, the sheriff collected from the guardian J. M. Turner, $200.00, and from the surety Martin Gaither, $100.00, January 7th, 1885. In August, 1883, Henry Turner paid the said ward $1,200.00, which sum was paid before the judgment mentioned was obtained, with the understanding that it should be credited on it when obtained. On the

last mentioned day, the said ward and her husband assigned this judgment to J. Chap. Turner; and Henry Turner, surety, having died on the 17th day of May, 1883, his administrators paid the balance of it.

It appears that the second guardian became and was insolvent on and ever after the 4th day of June, 1881, and the sureties, Martin Gaither and Humphrey Nichols, became and were insolvent after the judgment mentioned was obtained; and Benjamin Turner, the first guardian, is also insolvent.

The first guardian, Benjamin Turner, did not account sufficiently and fully with his successor guardian, J. M. Turner, in respect to his ward's property in his hands. The ward and her husband, on the 26th of January, 1885, brought this action in the Court above named, against the first named guardian and the sureties to his guardian bond, given on the 16th of November, 1858, alleging breaches of the conditions thereof, in that he had not accounted to the second guardian as he ought to have done, and had property and effects of the ward, &c., and obtained judgment at May Term, 1886, of the Court.

The second guardian, J. M. Turner, suing as such guardian, in the name of the State on his relation, brought this action in the same Court, on the 25th day of February, 1880, against the former guardian, Benjamin Turner, and the sureties to both his bonds as guardian first above mentioned, alleging as his cause of action, breaches of the conditions of those bonds, in that the said former guardian had not accounted with him in respect to the property, money and effects of his ward as he ought to have done, and he demanded judgment for the amount of the bonds respectively, for an account of the guardianship, &c., &c.

Pending this action, the relator therein, the said second guardian, J. M. Turner, died intestate on the 17th day of March, 1885, and J. J. Clendenin was appointed administrator of his estate.

Afterwards, at the February Term, 1886, of said Court, the last named administrator was made party plaintiff in this action instead and in place of his intestate, and filed his complaint therein, adopting the complaint of his intestate, alleging further, that the said ward and her husband had since the bringing of this action, recovered the judgment first above mentioned against his intestate for moneys and effects received by the defendant Benjamin Turner, while he was guardian for his ward, &c.: and he further demanded judgment for the amount of the judgment so obtained against his intestate, &c.

To this supplemental complaint, the defendant Sharpe, a surety, demurred, assigning as grounds of demurrer, first, that "the plaintiff as administrator of the deceased guardian, cannot maintain an action on the bond of the former guardian for a fund due his ward, but that the action should be brought by the ward, if she is now of age, or in her name by the second guardian if she is still a minor, because the administrator cannot maintain an action for the fund which his intestate ought to have collected."

Subsequently the Court made this order: "This cause coming on to be heard at this May Term, 1886, of Iredell Superior Court, before his Honor, MacRae, Judge, upon the complaint and demurrer filed by A. P. Sharpe, and being heard upon the said pleadings; it is adjudged by the Court, that the defendant's first ground of demurrer, as stated in the said demurrer on file, be sustained; it is further adjudged, that the defendants recover of the plaintiff all the costs incurred in this suit, up to and including this term of the Court, to be taxed by the clerk of this Court; plaintiff allowed to amend his complaint, and to make new parties within thirty days; defendant allowed till next term to answer."

Thereupon at the same term of the Court, Martin Gaither, surety above named, and W. W. Turner, and J. M. Turner,

Jr., administrator of Henry Turner, deceased, who was also surety of the second guardian, deceased, were allowed to become parties plaintiff with the said J. J. Clendenin, administrator, and they then filed a new complaint, in no way relating to or connected with the pleadings preceding it, in which they allege new and different causes of action: that the defendant Benjamin Turner, the first guardian named, has failed to account to the said second guardian, deceased, in his life-time, for large sums of money of his said ward; that the ward had obtained the judgment first above mentioned against the second guardian and the sureties to his guardian bond; that they had respectively paid parts, aggregating a sum equal to the whole of that judgment, and were entitled to be subrogated to the rights of the said ward against the defendants, and to have them severally contribute, &c., &c., and they demanded judgment accordingly.

Afterwards, the defendants filed their answer to the last mentioned complaint, in which they substantially deny the principal allegations therein; plead the statute of limitation; and insist that the present plaintiffs have been improperly allowed to come into this action as new parties, long after it began—after the pleadings of the original plaintiff and the defendants had been filed—and have been allowed to file a new complaint, in which they allege an entirely new, distinct and different cause of action from that at first alleged, and one that has arisen, if it has foundation at all, since the action began, and they insist that the Court could not, certainly without their consent, thus make new parties plaintiff, and introduce a new cause of action into the action, and substantially make a new and different action.

At the trial, the Court adjudged that the plaintiff cannot maintain the present action, and dismissed the same. From this judgment, the plaintiffs appealed to this Court.

Messrs. D. M. Furches and *R. F. Armfield*, for the plaintiffs.
Messrs. T. B. Bailey and *M. L. McCorkle*, for the defendants.

MERRIMON, J., (after stating the facts). We express no opinion as to whether the plaintiffs' alleged cause of action is well or ill founded, because in any view of it, it arose and was introduced into this action long after it began, displacing entirely the original cause of action alleged. This is an anomaly that has no legal sanction, and cannot be allowed. Certainly the principal cause of action must exist in all cases at the time the action began. It would be unjust and absurd to bring a party into Court to answer the plaintiff, before he had a right to sue. The mere fact that the cause of action is introduced into a pending action, cannot alter the case, because this in effect makes the action a new one.

The notion that seems to prevail to some extent, that the Court has complete control of an action, and authority to change and mould its nature and purposes in its discretion, is a mistaken one.

The statute prescribes how actions shall be brought, and the course of procedure therein.

As soon as an action is brought and the complaint is filed, it takes on and has distinctiveness and integrity of nature as to the parties to it, and that may come or be brought into it, and the cause or causes of action sued upon, that permeate and go with it to its end. It is not subject to the arbitrary control of the parties or of the Court—it must be proceeded in according to law, and only such amendments as to parties or the cause of action, may be made as its nature and scope warrant. Amendments in this respect must be such, and only such, as are necessary to promote the completion of *the action begun*—all parties necessary for that purpose may come or be brought into it, and so also, any and all such amendments may be made as to the cause of

action, as may be necessary to its completeness in all respects. But neither general principles of practice, nor the statute providing for amendments, authorize amendments that reach beyond these purposes. Especially, the Court has no authority to allow such amendments as to parties, or as to the cause of action, as make a new, or substantially a new action, unless by the consent of the parties. Indeed, this would not be to *amend*, in any proper sense, but to substitute a new action by order, for and in place of a pending one, which the Court cannot do. General principles of procedure, and, as well, the statutory regulations upon the subject, contemplate and intend that an action shall embrace but one litigation or matter, and only such parties, matters and things, as are necessary, *germain*, and incident to it, except that several causes of action may be united in the same action, as specially provided by statute. Any other rule or method would certainly be subversive of orderly and intelligent procedure, and lead to intolerable confusion, as well as injustice to litigants. *Grant* v. *Burgwyn*, 88 N. C., 95; *Merrill* v. *Merrill*, 92 N. C., 657; *McNair* v. *Commissioners*, 93 N. C., 364; *Ely* v. *Early*, 94 N. C., 1.

Now, in the case before us, the action was brought by the second guardian against the first one and the sureties to his guardian bond, to compel him to account, &c.

The plaintiff died pending the action. Afterwards, his administrator became a party plaintiff and filed his complaint, alleging a new, distinct and entirely different cause of action, that arose since the action began. To this there was a demurrer, which was sustained, and the Court allowed the plaintiff to make new parties plaintiff, who, putting aside the complaint and all prior pleadings, filed a new complaint, alleging a new, distinct and different cause of action, substituted for the original plaintiff and the original cause of action alleged.

This was undertaking substantially to make a new action out of a pending one.

The Court therefore properly decided that the plaintiffs could not maintain the present action. Judgment affirmed.

No error. Affirmed.

THE TOWN OF HENDERSONVILLE v. WILLIAM PRICE et als.

Estoppel—Contract—Municipal Corporation—License.

1. Although a contract be invalid at the time of its execution, yet if the parties to it go on and treat it as valid, they will be estopped to deny its validity, provided they are *sui juris*, and that the invalidity of the contract does not arise from some illegality.
2. So where the defendant executed his bond to a municipal corporation for a license tax, instead of paying cash, he is estopped from setting up as a defence that the municipal authorities had no power to take such bond and issue the license, and consequently that the bond was void.
3. While the Board of Commissioners of a municipal corporation cannot issue a license to retail liquors for a longer period than one year, the time need not begin and terminate with the term of office of the Board which grants it, for they can grant a license which extends beyond their term of office, provided that it does not exceed one year, and does not begin to take effect after their term of office has expired.

(*Com'rs* v. *Roby*, 8 Ired., 255; *Com'rs* v. *Kane*, 2 Jones, 296; distinguished and approved).

This was a CIVIL ACTION, tried before *Avery, Judge,* at the Fall Term, 1885, of the Superior Court of HENDERSON county. A trial by jury was waived, and the Court found the facts as follows:

"On the 4th day of July, 1883, the mayor and commissioners of the town of Hendersonville, took from the defend-

ants a bond for the payment of $400, for the privilege of retailing spirituous liquors in said town till July 1st, 1884, as follows:

"$400. On or before the first day of July, 1884, we, or either of us, promise to pay the Commissioners of the town of Hendersonville, four hundred dollars liquor tax, for value received of them.

"Witness our hands and seals, this the 4th day of July, 1883.

"The above bond is to be paid in installments of one hundred dollars each, at the end of every three months, to-wit: the 1st day of October, 1883, and every three months thereafter."

This bond purported to have been taken by virtue of chapter 203, Private Laws of 1847, as amended by chapter 35, laws of 1883, and especially §5 of the latter act.

This action was brought on the 5th of August, 1884, by the mayor and commissioners who succeeded the former board in May, 1884. The defendants admit the execution of the bond, and resist its payment only upon the ground that the mayor and commissioners had no power or authority to take said bond for taxes, and had no power under the said acts, or under any general law, to give to any one the power or privilege of retailing for any time after the first Monday in May, 1884, when a new board was elected and qualified.

It was admitted as a fact that a mayor and commissioners were elected and qualified in May, 1884. Before the bond sued on was executed, the mayor and commissioners had passed an ordinance in the following words:

"Be it ordained by the Commissioners of the town of Hendersonville, in the county of Henderson, and State of North Carolina, that the following taxes, special, poll and *ad valorem*, shall be levied and collected for the purposes of improvement of streets, defraying expenses of the town, &c., viz.:

"SECTION 3. On every retailer of spirituous, vinous or malt liquors, there shall be a special privilege tax of four hundred dollars per annum, to be paid in advance or secured by bond, approved by the commissioners."

After the execution of the bond, and before the 1st day of January, 1884, the defendant Price made a payment of forty dollars on said bond. No part of the bond has ever been paid, except the said sum of forty dollars.

Upon the facts the Court held, that the plaintiff was not entitled to recover, and there was judgment accordingly. From this judgment the plaintiff appealed.

Mr. E. C. Smith, (*Mr. Thos. J. Rickman* also filed a brief,) for the plaintiff.

No counsel for the defendants.

DAVIS, J., (after stating the facts). The plaintiff is a body corporate, exercising its corporate powers through a mayor and board of commissioners. By the fifth section of its charter, it is provided among other things: "That in addition to the *ad valorem* tax on property and polls, the said Board of Commissioners shall have power to levy and collect the following special taxes for the privilege of carrying on the business or doing the acts herein after named, in said town, to-wit: (1.) On all licensed retailers of spirituous, vinous, malt or alcoholic liquors, not more than ten hundred dollars." By virtue of the power thus conferred, the commissioners passed the ordinance imposing a tax of $400 on retailers of spirituous liquors, as set out in the pleadings.

The special tax was "to be paid in advance, or secured by bond, approved by the Commissioners," and instead of paying it in advance, the defendant Price secured it by bond, the other defendants, and the intestate of the defendant M. S. Farmer, executing it under seal, as his sureties.

It is not denied that the plaintiff had the power to impose and collect the tax, but it is insisted for the defendant:

1. That the mayor and commissioners had no authority to take the bond for taxes.

2d. That they had no power or authority in July, 1883, to give any one license to retail for any time after May, 1884, when a new board was elected and qualified.

I. The answer to the first position is, that the defendant Price, instead of paying the tax in advance, executed his bond with sureties, approved by the board, obtained thereby a license, and enjoyed the benefit of the privilege to which the payment of the tax entitled him. He elected, for his own advantage and convenience, to give the bond instead of paying the tax in cash; it was executed under seal, and he and his sureties will not be heard to say that the commissioners had no power or authority to take such a bond. The consideration was not an illegal one, and they are estopped by its execution. "Though a contract be in fact wholly *invalid* when executed, still, (supposing it not to be prohibited by law as relating to some illegal transaction,) if it be acted upon afterward by the parties to it as valid, they will, if *sui juris*, be estopped thereafter to allege its invalidity." Bigelow on Estoppel, 575.

The commissioners were not prohibited by law from taking the bond, and, as against the defendants, its execution estops them from denying its validity. *Ryan* v. *Martin*, 91 N. C., 467, and cases there cited.

II. For the second position, the defendants rely on the authority of *Commissioners of Wilmington* v. *Roby*, 8 Ired., 255; and *The Commissioners of Raleigh* v. *Kane*, 2 Jones, 296.

These cases sustain the position, that the board of commissioners cannot issue license for more than one year, and that the tax therefor must be annual, but we do not understand, as the defendants insist, that the license must begin and terminate with the term of office of the board by which

it was granted. The Board of Commissioners for the town of Hendersonville for the year 1883, could issue a license for one year, and collect the tax for one year, but the license and the tax must be for only one year. The official term of the board of commissioners is from the first Monday in May, when elected, to the first Monday in May of the year following. The license is from the first of July of the year in which it is issued, to the first of July of the following year. The board of commissioners elected in May, 1883, had a right to issue a license for one year from the 1st of July, 1883, but they had no right to issue a license to begin after the expiration of their term of office, and that was all that was decided by the cases cited.

In *The Commissioners of Wilmington* v. *Roby*, the Board of Commissioners passed an ordinance on the 2d of January, 1844, levying a tax of $25 on a certain class of persons. It was not pretended that this tax was not valid for one year, but it was sought to collect a tax under it for 1846. RUFFIN, C. J., said: "The ordinance of January 2d, 1844, does not purport to extend to the year 1846, and, possibly, was not intended to operate beyond the year 1844. If, however, it was so intended, the commissioners exceeded their power, and for the excess, at all events, the ordinance was void."

In the case of *The Commissioners of Raleigh* v. *Kane*, under a law prohibiting the County Court of Wake from issuing license to retail spirituous liquors within the limits of the city of Raleigh, without the permission of the Board of Commissioners first had, the defendant procured a license, with the permission of the commissioners, to be issued at the February Term, 1854, of the County Court. He applied to the February Term, 1855, for a renewal of his license, under the permission of the board of commissioners granted in February, 1854. It was held, that the County Court at February Term, 1855, could not grant a license upon the permission of the Board of Commissioners of the city of Raleigh

granted in February, 1854, their authority having expired with their term of office. BATTLE, J., said: "The license which the Court may grant, must be in force for a part, greater or less, of the time during which the members of the board, who gave the permission, are in office."

In this case, the Board of Commissioners of the town of Hendersonville, elected in May, 1883, issued to the defendant a license for one year, beginning the 1st of July, 1883, and ending the 1st of July, 1884.

There is nothing in the cases cited to sustain the position that the board did not have the power to do so. On the contrary, they are authority for the position that the board had the power.

There was error. The plaintiff was entitled to judgment upon the facts found. Let this be certified.

Error. Reversed.

BEVERLY SCOTT v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

Issues—Contributory Negligence—Judge's Charge—Assignment of Error.

1. In an action for damages for an injury caused by the negligence of the defendant, where the defence is contributory negligence, it is sometimes proper to submit two issues, one as to the negligence of the defendant, and the other as to the contributory negligence of the plaintiff, yet when the action of both has contributed to the injury, it is allowable to submit an issue only as to the defendant's negligence, with instructions to find that in the negative, if the jury believe that the plaintiff's conduct contributed to the injury.

2. It is not *per se* negligence for the plaintiff to have driven his vehicle near one edge of a street approaching a railroad, although he could have obtained a better view of the track from the middle of the street.

3. It is not error for the trial Judge to refuse to charge that certain acts or omissions of the plaintiff amount to contributory negligence, when the evidence in regard to them is conflicting.

4. Where the plaintiff was injured at a point where the railroad track crossed the street, it is not *per se* negligence that he might have seen the moving cars at another crossing, where there were several tracks, and the evidence was conflicting as to whether he could have discovered that the cars were on the track which led to the crossing which he was approaching.

5. Error cannot be assigned in this Court that the trial Judge gave the instructions asked by the appellee to the jury, when no exception thereto is made in the record.

(*Kirk* v. *The Railroad*, 94 N. C., 625; *Cedar Falls Co.* v. *Wallace*, 83 N. C., 225; cited and approved).

CIVIL ACTION, tried before *Connor, Judge,* and a jury, at January Term, 1886, of NEW HANOVER Superior Court.

The action was brought to recover damages for an injury to the plaintiff, alleged to have been caused by the negligence of the defendant.

The following diagram will be of assistance in elucidating the matter:

NOTE:
C—Where struck.
D—Where dragged.
A B—Longest length that can be seen from R. R. on Nutt St. down track.
Width of track 5 ft.
Distance between fences at A, 47 ft.

Distance from west rail of track to fence on West 35 ft.
" " C to edge of plank road " " 15½ "
" " D " " " " " 21 "
" " A " " " " " 22 "
" " A to C, 82 "
" " A to where track crosses Nutt st., 627 "
" " A to same point following track, 675 "
Average length of freight car, 35 "

The defendant's train of cars, while backing up on the track on Nutt street, in the city of Wilmington, came in contact with the horse and dray driven by the plaintiff, then in the act of crossing, whereby both his property and him-

self sustained serious injury, the redress for which is sought in this action. The testimony was somewhat conflicting as to the circumstances, the management of the train, and the conduct of the plaintiff, when the collision occurred, and the degree of blame resting upon the parties respectively, in causing it. The defendant's track, as shown by the accompanying diagram, carefully prepared, and giving location of objects and accurate measurements of distances, crosses Nutt street some six hundred feet distant from the point C, the place of the accident, passes from the street in a curve on the adjoining land, and again emerges into and proceeds along the street. Its course is marked by a broken line, and intersects the worn pathway designated by pencil line, which was used by draymen, and others with vehicles, to avoid passing over the railroad at an oblique angle, and exposing them to danger from the wrench thus caused. From the point A, the train would be seen on all of the curve, except that part of the curve cut off by the broken dark line A B, prolonged, a distance of one hundred and fifty feet, and as the train was two hundred and eighty feet long, a considerable part of it would still be visible to the observer. The plaintiff, however, had driven his horse towards the east side of the street, so that his view was obstructed by the warehouse, and when he moved on towards the crossing place at K, the rear and foremost car in the train was so near that, as he testifies, he was unable to extricate himself from his perilous position and avoid the mishap.

It was admitted that as soon as the signal was given, the engineer did all he could to stop the train, but without avail. There was much testimony as to whether the bell was ringing as the train moved, or the whistle blown to warn persons of the presence of danger, and whether there was any lookout on the train, and it seems to have been conceded that there was none at the time on the foremost car of the back-

ing train The testimony was conflicting as to the speed with which the train was going, and not in harmony in other particulars, but the foregoing brief narrative may suffice to enable one to understand the action of the Court in the premises. The defendant denied any negligence in its own officers and servants, but relied mainly on the want of care and reasonable diligence in the plaintiff, by the exercise of which, it is alleged, the collision might have been avoided.

Two issues only were allowed to go to the jury, and these with the responses thereto, are as follows:

1. Was the plaintiff injured by the negligence of the defendant? Answer—Yes.

2. What damages did the plaintiff sustain? Answer—Fifteen hundred dollars

The defendant desiring to separate the negligence which it imputed to the plaintiff, from that charged upon the defendant in causing the result, proposed to submit a third issue, inquiring into the negligence of the plaintiff, as contributory to the injury sustained, and this was refused, for the reason, as stated by the Court, that it was involved in the first issue. Special instructions were asked for the defendant, all of which (except the 13th refused and the 14th modified,) were given. They were as follows:

"1. That the defendant was not bound to station a flagman at the crossing, and the failure to do so was not negligence.

"2. That the defendant was bound to no higher degree of care than the plaintiff was, and was bound to use only ordinary care.

"3. That if the engineer in charge of the train saw the plaintiff, or his dray, on the track, he was not bound to stop the train, but had a right to presume that he would get out of the way in time to escape the danger.

"4. That the defendant had a right to run its train backwards, if the exigence of its business required it; and it was not negligence to do so.

"5. That if the train was running in the day-time, at a low rate of speed, say five or six miles an hour, with a look-out on top of the cars, and the usual signals were given by ringing the bell and blowing the whistle, then the defendant was not guilty of any negligence; and the plaintiff cannot recover.

"6. That if the engineer in charge of the train neglected to ring the bell or blow the whistle, or omitted any other proper precaution, such neglect or omission did not relieve the plaintiff from the duty of making use of his senses of sight and hearing, and taking reasonable care for his own safety.

"7. That it was the duty of the plaintiff, on approaching the railroad crossing, to be on the alert, to look along the line of the road, to listen, and to use every reasonable means to discover whether a train was approaching, and if he failed to do so, he was guilty of neglect, and cannot recover, if that negligence contributed to bring about his injury.

"8. That if the plaintiff could have seen the train if he had looked, or have heard the whistle or bell, if he had listened, in time to get out of the way, he was guilty of negligence, and cannot recover.

"9. That the rule that where a person suddenly finding himself in a position of danger, loses his presence of mind and acts imprudently, he is not to be held responsible for it, does not apply to cases where the person has got into a position of danger by his own fault or negligence. And if the plaintiff could have seen the cars if he had looked, or heard the signals if he had listened, and was on the track with his dray, and, finding the cars approaching, in endeavoring to get his dray off the track pulled the wrong rein, whereby he prevented his horse from leaving the track in time to

escape the danger, he was guilty of negligence and cannot recover.

"10. That if the plaintiff was prevented from getting his horse and dray off the track by the fractiousness, stubbornness, or other fault of the horse, that will be imputed to him for negligence, and he cannot recover.

"11. If the plaintiff, after becoming aware of the approaching train, could have saved himself and his son from injury by the exercise of ordinary care, but continued in a dangerous position for the purpose of saving his horse and dray, and was injured in consequence thereof, he cannot recover.

"12. That if the plaintiff, by driving in the middle of the street, could have seen the train in time to get out of the way, but drove his dray so near to Morton's fence and warehouse, that he was prevented by them from seeing it in time to escape, then he is guilty of negligence and cannot recover.

"13. That if the plaintiff could have seen the cars when they passed at the first crossing, if he had looked, he was guilty of contributory negligence, and cannot recover.

"14. It is not sufficient for a plaintiff to show negligence; he must also show that the injury was the proximate result of that negligence. And if the defendant had no lookout on the cars, or if there was a lookout and he did not look, still if the plaintiff's position was such that he could not have been seen from the top of the cars, the plaintiff cannot recover for that act of negligence."

In beginning his charge, his Honor explained to the jury, that the first issue submitted to them involved the question of both the defendant's and the plaintiff's negligence, and if they found that the plaintiff was guilty of contributory negligence, then he could not recover.

His Honor then charged the jury as follows: "If the plaintiff went upon the defendant's track, and suffered in-

jury, he would be deemed negligent in so exposing himself to danger, if by ordinary care and attention he could either have seen or heard the approaching train at the time of entering upon the track, and in time to have made his escape. Hence, if you find from the testimony, that at the time of entering upon the track, the position of the plaintiff was such, that by the use of ordinary care, he could have seen the approaching train, or if you believe from all of the testimony that the bell was being sounded and the usual alarm whistle had been blown, and that by the use of ordinary care the plaintiff could have heard them or either of them at the time of entering upon defendant's road, he would be guilty of contributory negligence, and would not be entitled to recover. If at the time of entering upon the track, the plaintiff was in the street, and the curve in defendant's road, or any obstruction at the point of such entrance, prevented him from seeing such train of cars in time, and at a sufficient distance to avoid injury, and the defendant's train was being run without giving signal, either by blowing the whistle, ringing the bell, or some other mode sufficient for that purpose, the defendant would be guilty of negligence, and the plaintiff entitled to recover, unless by some act on his part, he contributed to the injury. Or, in other words, it would be negligent in the defendant to run its train in a public street in a city, around a curve, or where there were such obstructions as prevented a person, by the use of ordinary care, entering upon the road at a public crossing, from seeing the cars in time to avoid danger, without giving proper warning."

His Honor then gave the jury the special instructions asked for by the defendant, except those numbered 12 and 13, which he refused; but *in lieu* of No. 13, he gave the following, to-wit: "That if the plaintiff could have seen the cars when they passed the first crossing, and discovered that they were on the track, if he had looked, he was guilty of

contributory negligence, and cannot recover." Defendant excepted.

At the request of the plaintiff, his Honor gave the following instructions:

1. "If the jury believe from the evidence, that the place of the accident was a noisy part of the city, where the ringing of bells and blowing of whistles were frequently occurring, so much so that they were not calculated to put persons on their guard, the blowing of the whistle and ringing the bell would not be sufficient to give warning; but that the same facts which would increase defendant's liability to give greater warning, would increase the duty of plaintiff in the care which he should exercise. That they were bound in the same degree of care.

2. "That although plaintiff may have known of the curve, and the running of trains over this track, he was not negligent if he followed the regular beaten track of drays and other vehicles, although this track carried him so near the fence or building as to partly cut off the view of the track; provided, before doing so he used reasonable and ordinary care to ascertain whether a train was approaching."

In conclusion, his Honor said to the jury:

"Was the damage occasioned entirely by the negligence of the defendant, or did the plaintiff himself so far contribute to the misfortune by his own negligence or want of ordinary and common care and caution, that but for such negligence and want of common care and caution on his part, the misfortune would not have happened? If you believe the first branch of the proposition to be the truth, then you will answer the issue in the affirmative. If you believe the last to be true, you will answer the issue in the negative. The general rule is, that the burden of proof rests with the plaintiff, or the party making the allegation. As here, the plaintiff alleges that he was injured by the negligence of the defendant's agents, it is his duty to satisfy

you by a preponderance of the testimony that this is true. If from the plaintiff's proof, it appears to you that the injury was caused by the defendant's negligence, and the defendant seeks to repel this by averring contributory negligence on the part of the plaintiff, the burden of proof shifts, and it must, by testimony of the same probative force, establish the averment. If, however, the plaintiff upon his own proof, shows that according to the rules of law laid down by the Court, he contributed to the injury, the burden is not on the defendant, but it may rely upon the failure of the plaintiff to make out his case, and need not introduce testimony. I charge you that the plaintiff cannot recover, if by his own negligence he contributed to the injury."

There was a judgment for the plaintiff, and the defendant appealed.

Messrs. D. L. Russell, Ricaud and *J. D. Bellamy*, for the plaintiff.

Messrs. Geo. Davis and *C. M. Stedman*, for the defendant.

SMITH, C. J., (after stating the facts). There are but three errors sufficiently assigned in the record requiring the exercise of our appellate jurisdiction, and these are the refusals to submit the proposed issue as to the defendant corporation's agency in bringing about the disaster to the person, horse, and dray of the plaintiff; and to give the 12th instruction, as also to the modification in that next numbered.

I. The issue proposed and refused:

It is true, the inquiries into the defendant's negligence, and that imputed to the plaintiff, contributing to the result, might have been presented to the jury in separate issues, as was done in *Kirk* v. *Railroad*, 94 N. C., 625, inasmuch as the liability for the consequence depends on the presence of the one and the absence of the other on the occasion of the mishap. Yet when the action of both has contributed to the bringing about

of the injury, it is sometimes not easy to run the dividing line between the co-operating agencies, and say where the essential culpability rests. The Judge deemed the association so close as to involve both inquiries, and that the same end would be reached, and the minds of the jury less distracted from the merits of the controversy, by having a single issue, under directions to render a negative response, if upon the evidence, it appeared, that the injury would not have been suffered, had the plaintiff exercised proper care and vigilance in avoidance. So he charged the jury, and we must suppose his instruction was understood and acted upon. If so, the defendant has had every advantage which a second issue, if allowed, would have given him, and no prejudice has come in consequence of the refusal. *Cedar Falls* v. *Wallace*, 83 N. C., 225.

II. The denied instruction:

We can see no error in this ruling. There is no negligence in the single act of passing from the middle of the street where the approaching train could have been seen, to a place where a partial obstruction to the view was met. It was in moving thence towards the track, without a sharper lookout and greater carefulness, to which negligence can be attributed, and this is covered by other parts of the charge.

III. The modified instruction:

The instruction in the form asked, was entirely inadmissible, for seeing the cars at the first crossing, would not make the plaintiff "guilty of contributory negligence" and defeat his recovery, while it should have imposed greater caution on him, driving onward afterwards. Yet even this was given, with the addition, that this would be so, if when he saw the cars, he discovered that they were on the track that brought them towards him, and the ability to thus distinguish, depended on conflicting testimony, bearing upon the series of instructions favorably responded to We can see no just grounds of complaint afforded the appellant.

The instructions given at the instance of the plaintiff are not excepted to, nor is the ruling assigned as error. Nor if it had been, would we be prepared to sustain the exception thereto.

We cannot disturb the verdict, for the responsibility of rendering it, when there is any reasonable, that is any, evidence to warrant the finding, rests upon the jury.

There appears no error in the record, and the judgment must be affirmed.

No error. Affirmed.

IRA LYON et als. v. T. B. LYON.

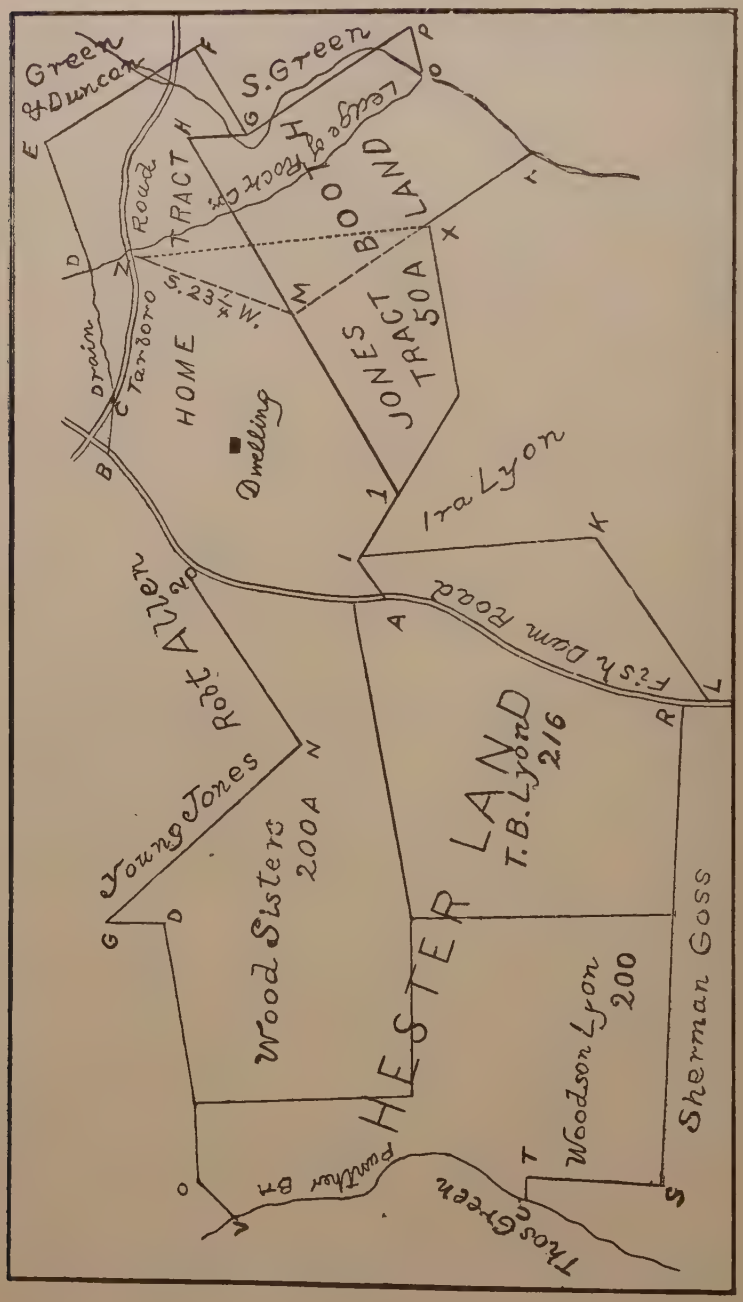
Will—Boundary.

1. Where a devise described the devised land as containing two hundred acres, the area cannot control the boundaries by which the land is also described in the will.
2. In doubtful cases the area may aid in determining the boundaries, but when it is at variance with them, it must be disregarded.

(*Campbell* v. *Branch*, 4 Jones, 313; *Spruill* v. *Davenport*, 1 Jones, 203; cited and approved).

CIVIL ACTION, tried before *Connor, Judge,* at Fall Term, 1886, of GRANVILLE Superior Court.

The following map will explain the controversy:


Green & Duncan
G. S. Green
Rock Co.
TRACT H
Road
Tarboro
drain
HOME
Dwelling
JONES TRACT 50A
BOOLAND
Ira Lyon
Fish Dam Road
Young Jones
Robt Allen
Wood Sisters 200A
HESTER LAND
T. B. Lyon 216
Woodson Lyon 200
Sherman Goss
Thos Green
Pender Co

There was a judgment for the defendant and the plaintiffs appealed.

Mr. John W. Hayes, for the plaintiffs.
Mr. E. C. Smith, for the defendant.

SMITH, C. J. John W. Lyon died in December, 1878, having on the 11th day of April preceding, made his will, which has been proved, and contains among others, the following clause:

"*Item.*—I give to my nephew Ira Lyon, and my two nieces, Kate and Loretta Lyon, children of my brother, William M. Lyon, 200 acres of land bounded as follows: Beginning on the top of the hill north of the Hester Branch, in the Fish Dam road, thence with said road to Allen's line, thence down a drain to the Ledge of Rock Creek, and by a chopped line to Duncan's corner, thence with my line to the road, thence with the road to the Ledge of Rock Creek, thence up the road to some point so as for a line running about south through my land to take in my dwelling, to the line of the land that I bought of Jones, thence with the Jones line about west to the beginning, making 200 acres, to them and their heirs."

The present action, commenced on the 27th day of August, 1885, is to recover possession from the defendant of a parcel of land, triangular in form, and bounded by lines which connect the points or corners designated by the letters Z, M and X on the accompanying plat, used on the trial, which the plaintiff alleges is devised to him in the clause quoted. The answer denies the plaintiff's title, as thus derived, and the parties, waiving a jury, agreed to submit the issues of fact, as well as of law, to the Judge, to be by him tried and determined.

The testator, it was admitted, owned four tracts, represented on the plat, and known as the Hester tract, the Jones

tract, the Booth tract, and the Home tract, whereon he had his residence. Of these, the deed of conveyance of that first mentioned, calls for 573 acres, while in fact it contains 616 acres; the deed for the Home tract, calling for 216 acres, containing 176 acres only, and that the Jones tract consists of 50, and the Booth tract of 106 acres.

It was conceded that the boundary lines of the devised land, beginning at A, and running around on the north to Z, are correctly located, and that this is the terminal point mentioned in the call, "thence with the road to the Ledge of Rock Creek," being the intersection of the road with the creek.

The parties contend—the plaintiff, that the line must thence be projected to the corner of the Jones tract, and thence to M and I, following two of its boundaries; the defendant, that the next line must be projected to the corner at M, and then proceed with his boundary to I. If the latter be the true running, the defendant will not be a trespasser, while if the former be adopted, he will be.

The argument for the plaintiff is, that the line he claims runs nearly a south course, and would enlarge his area to 181 acres, approximating the number mentioned in the will, while the line thence to M, could diverge much more to the west, and reduce his tract to 161 acres.

The argument for the defendant is, that the testator was misled as to the size of the Home tract by the false recital in his deed, which overestimates its area by 40 acres, and that assuming the testator to have been laboring under the impression that the recital of quantity in the deed was true, the direct line from Z to M, would give the devisees land approximating the number of acres mentioned. Moreover, that would more conform to the call, "thence with the Jones line, about west to the beginning," while the other, running after reaching the Jones land, would pass along its boundary, first in a north-westerly, and then a south-westerly

direction, a still greater departure from the description in the will.

It will be noticed, that while assented to as an ascertained corner in the boundary, and so recognized in laying off the tract to the devisees after the testator's death, from which to proceed to the Jones land, the preceding call in the will is entirely ignored.

The line, pursuing the course of the road until it meets the Ledge of Rock Creek, does not stop there, but continues on "*up the road* to some point, so as for a line running almost south through my land to take in my dwelling, to the line of the land I bought of Jones," &c. How far up the road, and at what point to deflect to go to the Jones land, the testator does not state, except that it must not go so far as to interfere with the dwelling which is to be upon the devised part, and we must resort to other means of ascertainment. In the absence of directions and to give effect to the descriptive terms employed, the proper way is to proceed to the point in the road nearest to the Jones land, and then by the most direct and shortest route to it. *Campbell* v. *Branch*, 4 Jones, 313. By following the road after it crosses the creek, the described boundary is pursued, and the indefinite distance is fixed, by the rule which requires the line to deflect at such place on the road, when this and the next call will give a route to the Jones land, and at the nearest point on it, shorter than by any other running. This location also takes in the dwelling as is required. The course of the last line is "about south" and does not depart from the general words of the devise, and is more generally south than from the intersection at the creek. *Spruill* v. *Davenport*, 1 Jones, 203.

The misconception of the testator as to the quantity of the Home tract, induced perhaps by the false recital in the deed, may account for his overestimate of the area of that devised, but it cannot control the boundaries which define

it. The excess or the deficiency in the number of acres supposed to be in the tract, may, in doubtful cases, aid in determining the boundaries, but when at variance with them, must be disregarded as a mistake of the party.

It is unnecessary to pass upon the exceptions to the evidence, since they do not enter into the decision of the case, and are not material. But we do not mean to intimate that there was any error in receiving it, had it been otherwise.

The manner of running the boundaries when the devised land was separated to the devisees, and which are conceded in the present trial to be correct and are not controverted by the defendant, is quite as favorable as they can ask.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

JOS. W. HOBSON et al. v. T. C. BUCHANAN.

Specific Performance—Vendor and Purchaser—Costs—Appeal.

1. In an action to compel the vendee to a performance of the contract, it is sufficient if the vendor can show a good title at any time before a final decree, although he did not have the title when the action was brought.
2. A vendee is not entitled to recover costs in an action to force him to perform his contract and pay for the land, if he contest the case and does not make a deposit of the amount due, although the plaintiff cannot make a good title at the time when the action is commenced.
3. *It is intimated*, that the vendee could recover his costs in such case, if he made deposit of the balance due, and accepted the title as soon as the vendor had perfected it.
4. Although an appeal will not lie when the costs only are involved, yet when it calls in question the entire judgment and the costs only as incidental, it will be entertained.

(*Hughes* v. *McNider*, 90 N. C., 248; *Fortune* v. *Watkins*, 94 N. C., 304; *May* v. *Darden*, 83 N. C., 237; *State* v. *Byrd*, 93 N. C., 624; *Morris* v. *Morris*, 94 N. C., 613; cited and approved).

HOBSON *v.* BUCHANAN.

CIVIL ACTION, heard before *Avery, Judge*, upon exceptions to the report of a referee, at Fall Term, 1885, of MITCHELL Superior Court.

On the 28th day of November, 1883, the parties to the suit entered into a contract for the sale by the plaintiffs, and the purchase by the defendant, of a tract of land supposed to contain fifty acres, whereon was a grist mill and saw mill, for the sum of $1,450, whereof $700 was paid at the time, and a note payable on March first, thereafter, given for the residue. The title was, under said agreement, to be retained as a security for the unpaid amount, and when paid, to be conveyed to the vendee.

The note not being met at maturity, the present action was instituted on the 7th day of April, the month following, to recover the money due thereon, and an order for the sale of the land, if necessary therefor.

The plaintiffs allege their ability and readiness to convey the land, and file with their complaint a deed, properly executed in form, to be delivered on payment of the note.

The answer, among other things offered in defence, avers that the plaintiffs have not title, and their deed being inoperative to pass it in fee, is not a compliance with their own stipulations in this behalf.

To inquire into and report upon the plaintiffs' title, at Fall Term, 1884, reference was made to J. S. McElroy, commissioner, who reported, with the testimony and exhibits, the result of his inquiry to be, that while by reason of a tenancy in common with one Nathan Beechfield, held in a larger tract conveyed to them by J. W. Bowman and wife, of which this in dispute forms part, the deed filed could only pass a moiety of the estate, the tenant in common had since conveyed his share to the plaintiffs, and being then seized of the whole estate, they had, by deed made on April 13th, 1885, removed the impediment, and it was sufficient and does pass the title to all the land contained in the contract.

Exceptions were taken by defendant, which by consent were sustained, except the third and fourth, and subject thereto, the report was confirmed, with a judgment for the debt, and the sale of the premises to satisfy it, unless paid by defendant within ninety days thereafter, and for costs.

The case prepared on the appeal states, that the first two exceptions were abandoned, and the last two only relied on. Of these, the one is to the referee's conclusion of law, that the deed of April 13th, 1885, fully satisfies the obligation of the bond; the other is, that this deed is not in the form of that tendered at the filing of the complaint, and does not convey the same number of acres.

The defendant appealed.

Mr. W. H. Malone, for the plaintiffs.

No counsel for the defendant.

SMITH, C. J., (after stating the facts). The material finding, that the last deed is sufficient to convey, and does convey the estate in fee in the land, and embraces all the territory described in the bond, the conditions essential to a recovery of the debt and the maintenance of the action to enforce payment by a sale of the premises, is left undisturbed by the exceptions, and forms no barrier to the relief sought.

It is sufficient that the vendor is able to make title before final judgment, although not when his suit was begun. It is so held in *Hughes* v. *McNider*, 90 N. C., 248; and *Fortune* v. *Watkins*, 94 N. C., 304; and other cases.

The matter involved in the exceptions, as ruled by the Court below, only enters into an inquiry as to the costs. The argument derived from the fact that the plaintiff could not make title when he began his action, would have more force if the defendant had been ready to make payment on condition of getting the estate bargained for; nor does he make deposit, as does the plaintiff of a sufficient deed, to avoid

any further proceeding in the cause. He opens a warm contest, and persists in it up to the last moment, and fails. Why then should he not be taxed with costs so incurred, as well as those incurred upon the appeal?

It is suggested that an appeal involving costs merely, will not be entertained, but the appeal calls in question the entire judgment, and the costs only as incidental thereto. *May* v. *Darden*, 83 N. C., 237; *State* v. *Byrd*, 93 N. C., 624; *Morris* v. *Morris*, 94 N. C., 613.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

L. D. GULLY v. WILLIS COLE.

Homestead.

1. Where the homestead has once been regularly allotted and set apart, it cannot be re-allotted at the instance of a judgment creditor whose debt was in existence when the allotment was made, except for fraud or other irregularity.
2. *Quere*, as to the equitable remedy which creditors might have, if the homestead had increased in value since its allotment.

APPEAL from the allotment of a homestead, heard before *Clark*, *Judge*, at October Term, 1885, of WAYNE Superior Court.

The material facts are, that in 1879, J. M. Powell, having obtained a judgment for money in the Superior Court of the county of Wayne, against the defendant, an execution thereupon duly issued to the sheriff of that county, and the defendant therein—the present defendant—owning a tract of land and having a homestead thereon, the same was duly valued and laid off to him, and it embraced one hundred

and ninety-five acres. It is not alleged, nor was there evidence to prove, that the homestead has increased in value since it was laid off, nor is there any suggestion of fraud or irregularity in any respect in laying it off. Subsequently, the present plaintiff, having obtained judgment in the same Court against the defendant, founded on a debt existing at the time the homestead above mentioned was laid off, an execution issued thereupon to the sheriff of the same county, and he proceeded under the last named execution to summon appraisers and lay off the defendant's homestead a second time in the same land, as if no homestead had ever theretofore been laid off therein to the defendant. The defendant objected to the second proceeding, contending that the same was wholly unwarranted by law, and that his homestead laid off to him as first above mentioned, was wholly exempt from sale under the plaintiff's execution, or other like executions, and could not be lawfully disturbed by an execution creditor.

Upon such objection, and exceptions to the report of the appraisers, the Court decided, that it was competent thus to lay off the homestead of the defendant a second time in the same land at first designated as and for his homestead, and the report of the appraisers being insufficient, it made an order directing them to re-assemble and lay it off according to law. The defendant excepted and appealed to this Court.

No counsel for the plaintiff.

Messrs. C B. Aycock and *E. R. Stamps*, for the defendant.

MERRIMON, J., (after stating the facts). The Constitution, (Art. IV.), secures a homestead, not exceeding in value one thousand dollars to the owner thereof, to be exempt from sale under execution or other final process obtained on any debt, subject to certain exceptions not necessary to be mentioned here. In aid of this constitutional provision, the

statute (*The Code*, §§501–524), prescribes with much particularity and detail how the homestead thus allotted shall be ascertained and laid off to the owner thereof, and §523, having reference to such ascertainment, provides, that "any appraisal, or allotment by appraisers or assessors, herein before provided, may be set aside for fraud, complicity or other irregularity; but whenever any allotment or assessment shall be made or confirmed by the Superior Court at Term time, as herein before provided, the said homestead shall not thereafter be set aside or again laid off by any creditor." It is further provided by §524, that "when the homestead and personal property exemption shall be decided by the Court at Term time, the clerk of the Superior Court shall immediately file with the register of deeds of the county, a copy of the same, which copy shall be registered as deeds are now registered by law; and in all judicial proceedings, the original, or a certified copy of said returns, may be introduced in evidence"

The purpose to give the appraisal and allotment of the homestead, fixedness and permanency—to designate where the homestead is—to settle its value and what it embraces—plainly appears from the statutory provisions cited. Reasonable opportunity is afforded to all creditors existing at the time of the appraisal and allotment thereof, to appear, contest, and scrutinize the right of the person claiming it. If they appear and contest unsuccessfully, or if they decline to interpose objections within the time, and in the way prescribed, they must be concluded, except that they, or any one or more of them, may afterwards question the appraisal, or the allotment and have the same "set aside for fraud, complicity, or other irregularity" made to appear in a proper way.

The report of the appraisal or allotment, whether made by the sheriff and the appraisers simply, (*The Code*, §504), or by confirmation of the Superior Court in Term time, is

required to be registered, the object being to give notice to all persons dealing with the owner of the homestead, that it is his homestead, not subject to be sold "under execution" or other final process, obtained on any debt against him.

Moreover, such provision is reasonable and just. The law intends that the persons to be benefited by the homestead, shall have the full measure of benefit that may justly arise from it. This end would be poorly secured, if every creditor could have a re-appraisal and allotment at his will and pleasure. If this were allowed, there would be no stability to the right intended to be established. One set of appraisers would make one appraisal and allotment to-day—a different set might make different ones next week, and a third set different ones next month. Such a practice would impair the right, and rob the beneficiaries of the benefit and satisfaction of having a home secure.

In this case, it is not alleged that the appraisal or allotment of the homestead is affected with fraud, or in any way with irregularity. Nothing to the contrary appearing, it must be taken that these things were done fairly and in the regular way prescribed by the statute, and the report thereof duly registered; and being so, the appellee has no right to have appraisal and allotment of the homestead of the appellant set aside, or the same done a second time. The statute makes no provision in such case for laying off the homestead a second time.

What equitable remedy, if any, the creditors might have, if the homestead property had greatly increased in value since the appraisal thereof, we are not now called upon to decide.

There is, therefore, error.

Let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. Reversed.

W. W. OVERMAN v. J. M. SIMS.

Controversy without Action—Conditional Limitations.

1. In the submission of a controversy without action, the statement of facts upon which the judgment of the Court is asked, should not be a mere narration of the facts out of which the controversy arises, but should contain a statement of the subject matter and nature of the controversy and of the conflicting claims of the litigants.
2. Where no members of a class to whom a conditional limitation is limited are *in esse*, a proceeding for partition to which all of the parties in interest who are *in esse* are parties, will not give them a fee simple.
3. Land was conveyed to T T and his heirs, to hold for the use of M T for her life, and at her death to such child or children, and the representatives of such, as she shall have by T T living at her death, and their heirs forever. M T had two children by T T living, but such children had no issue; *Held*, that M T and her children by T T could not convey a fee simple in the land, and the fact that the land had been divided by a proceeding for partition did not cure the defect.

(*McKeithan* v. *Ray*, 71 N. C., 165; *Moore* v. *Hinnant*, 87 N. C., 505; *Hager* v. *Nixon*, 69 N. C., 108; *Lewis* v. *The Commissioners*, 74 N. C., 194; *Ex parte Dodd*, Phil. Eq., 97; *Watson* v. *Watson*, 3 Jones Eq., 400; *Williams* v. *Hassell*, 74 N. C., 484; *Ex parte Miller*, 90 N. C., 625; *Young* v. *Young*, at this Term; cited and approved).

CONTROVERSY submitted without action, heard by *Montgomery, Judge*, at Chambers, in Charlotte, on April 22d, 1887.

The following agreed statement of facts is submitted to the Court, as a controversy without action, under §567 of *The Code:*

In the year 1879, Thomas R. Tate purchased at a sale under execution, three fifths of the real estate known as the Overman home place, in the city of Charlotte. The sheriff of Mecklenburg county conveyed the same by deed to Thos. R. Tate and his heirs, to hold for the sole and separate use of Mary C. Tate, for her life, and at her death to such child or children, and the representatives of such, as she shall

have living by Thomas R. Tate, and their heirs forever; but should the said Mary C. Tate die without a child, or representatives of such, living at her death, then to the said Thomas R. Tate, and his heirs forever. In 1874, Thomas R. Tate died, leaving surviving him his widow Mary C. Tate, a number of children by a former marriage, and Caswell Tate and Annie Tate, children of Mary C. Tate.

In 1886, the plaintiff was the owner in fee simple of four fifths of the remaining two fifths of the said real estate, and was also owner of one fifth of said two fifths during the life of Charles Overman. C. H. Overman was the owner of the remainder in the said one fifth of two fifths after the death of Charles Overman.

In November, 1886, the plaintiff brought his action for partition of the premises before the clerk of the Superior Court of Mecklenburg county; making parties defendant the heirs at law of Thomas R. Tate, among the number Caswell Tate and Annie Tate, minor children of Thomas R. Tate and Mary C. Tate, C. H. Overman and Mary C. Tate. Such proceedings were had, that there was a judgment for a partition of said premises, and commissioners were appointed to make said partition among the parties according to their respective interests. The commissioners filed their report on the first day of January, 1887, and after due notice to all of the parties to said action, the report was confirmed without objection, by a judgment of the Court dated April 1st, 1887.

On the 7th day of April, 1887, the plaintiff and the defendant Sims, entered into a contract in writing, properly executed, by which the plaintiff obligated himself to convey to the defendant by deed with full covenants of seizin and warranty, a part of the land allotted to the plaintiff in the action for partition, and fully described in said contract; and the defendant agreed to pay to plaintiff upon the receipt of such deed, the sum of eighteen hundred and fifty-six dol-

lars and twenty-five cents. On the 18th day of April, 1887, the plaintiff offered to deliver to the defendant a good and perfect deed with full covenants of seizin and warranty, as he had contracted to do. The defendant refused to accept such deed, upon the ground that the plaintiff's title was defective, for the reason that the plaintiff had no right to have partition of the premises.

Upon this submission, the Court at Chambers declared the title of the plaintiff to be defective, and adjudged that the defendant go without day and recover his costs.

From this judgment the plaintiff appeals.

Messrs. Osborne and *Maxwell* filed a brief for the plaintiff.
Mr. Platt D. Walker, for the defendant.

SMITH, C. J., (after stating the facts). We do not approve of this method of presenting a mere narrative of the facts, out of which the controversy springs, without any statement of the subject-matter of contention, and the conflicting claims of the litigants to be passed on and decided. While formal pleadings are not required, nor any preliminary process, to secure jurisdiction, the statute manifestly contemplates the existence of a *controversy*, and the case agreed should set out its nature, so that the Court may understand what is intended to be submitted, and render an intelligent decision. An analogy in the practice is found in suits in equity, when a bill of interpleader is filed to bring contesting claimants to the thing in the hands of the complainant, before the Court, for a binding and definite determination of the right, in which the contentions of the adversary parties are set out; and similar in this feature is the bill filed by a trustee to obtain the advice of the Court as to the disposition of a trust fund among rival claimants. Story Eq. Pl., §292.

The form prescribed by the author of Abbott's Forms, vol. 2, page 710, under the same clause, specifically describes the

controversy arising upon the facts, and the rulings to be made according to the opinion of the Court of their legal operation; and such is the form of presenting the matter in many of the adjudications of this Court. *McKeithan* v. *Ray*, 71 N. C., 165; *Moore* v. *Hinnant*, 87 N. C., 505.

But there are precedents where jurisdiction has been assumed and exercised, and the nature of the controversy inferred from the mere statement of the facts. *Hager* v. *Nixon*, 69 N. C., 108; *Lewis* v. *Commissioners* 74 N. C., 194; in neither of which were the rulings to be made pointed out, and in the former the agreement was, that the Judge "hear and determine the case, and render judgment therein, as if an action presenting this point were depending before him."

But most obviously as the Court cannot go outside of the case, for it constitutes the entire record, there should be in it some substitute for the pleadings in an ordinary action, in a brief explanation of the subject-matter of the contesting claims, and enable the Court to "hear and determine the case," thus presented.

Upon the merits of the case, we concur in the opinion of the Judge, that a full and absolue title, free from contingent limitations, and such as the contract specifies, cannot be made to the premises. The deed of the sheriff is not in the transcript, but according to its provisions, as set out in the case, it makes a limitation, to take effect at the death of the life-tenant, Mary C., to such of the children and the representatives of such as meanwhile may die, of herself and husband Thomas R., who may then be living, and as it is uncertain who may fulfill these conditions, the estate is contingent, and none of that class are known to represent the others and to bind them in the partition proceeding.

It is true, as argued in the brief of plaintiff's counsel, the title of the vendor would be good, if the two living children, Caswell and Annie, should both die before their mother with-

out issue, for in such event, the limitation over would be to Thomas R., their father in fee, and both he and they are parties to the suit for partition. But the contingency would remain, that the issue of Caswell and Annie would become entitled, if such there were, upon the death of the life-tenant, if Caswell and Annie were not then living to take. *Dodd ex parte*, Phil., Eq., 97; *Watson* v. *Watson*, 3 Jones Eq., 400; *Williams* v. *Hassell*, 74 N. C., 484; *Miller ex parte*, 90 N. C., 625; *Young* v. *Young*, at this Term.

There is no error.

No error. Affirmed.

J. A. PATTON v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Fellow-Servants—Burden of Proof—Issues—Contributory Negligence.

1. The burden of proof is on the plaintiff to show that a co-employé of a common master is a superior and not a fellow-servant, unless the nature of the employment shows the extent of the co-employé's powers.

2. Where the common master invests one of his employés with the power to hire, discharge, command and direct the other employés, the master is liable for his acts, and he is not a fellow-servant, although he works as any other servant, and there is nothing in the nature of the employment to show an authority to charge the common master.

3. So, while there may be nothing in the nature of the employment of a section master on a railroad to charge the master with responsibility for his acts towards his co-laborers, yet if the master gives him authority to command, discharge and employ the laborers, the common master is liable for his misfeasance towards his fellow-laborers in the exercise of the authority so conferred.

4. The only issues proper to be submitted to the jury are those raised by the constitutive facts alleged on the one side and denied on the other: and those issues which are merely evidential, and when found by the jury, only furnish facts which would be evidence to prove the main issue, should never be submitted.

5. One who is injured by jumping from a moving train is generally barred of a recovery by reason of his contributory negligence, but where a servant was ordered by his superior to do so in order to perform a duty for the company, it not appearing to the servant at the time that obedience would certainly cause injury: *It was held*, that there was no such contributory negligence as would prevent a recovery.

(*Dobbin* v. *The Railroad*, 81 N. C., 446; *Cowles* v. *The Railroad*, 84 N. C., 309; *McElwee* v. *Blackwell*, 82 N. C., 345; *Miller* v. *Miller*, 89 N. C., 209; *Overcash* v. *Kitchie*, 89 N. C., 384; *Swann* v. *Waddell*, 91 N. C., 108; cited and approved).

CIVIL ACTION, tried before *Graves*, *Judge*, at Spring Term, 1886, of MCDOWELL Superior Court.

The plaintiff brought this action to recover damages for injuries sustained by him, as alleged in the material parts of his complaint, whereof the following is a copy:

"II. And the plaintiff, at and before the injuries and wrongs herein after mentioned, was employed by the defendant as a section hand on the section from ..... to Old Fort, on the line of the railway, at and for a certain hire and reward agreed upon by the parties in that behalf; that the plaintiff was hired and employed by one Grant, who was the agent and servant of the defendant in that behalf, the said Grant being the section boss or foreman for said section, with full power and authority of the defendant to hire and discharge hands and servants in that behalf on said section, and who was the superior of the plaintiff in that behalf, whose orders and commands, in the line of said service, as the agent, foreman and boss of the said defendant, the said plaintiff was lawfully bound to obey.

III. That on or about the ..... day of March or February, A. D. 1883, the said Grant, as such section boss, foreman

and agent of the defendant, and superior of the plaintiff, ordered and commanded the plaintiff to go on board a train, at the village of Old Fort, on the line of said defendant's railway; the train of the defendant being managed, controlled, run and conducted by the agents and servants of the defendant, and the plaintiff obeying the order and command of the said Grant, in the line of his duty under his contract of service, did get on said train with the said Grant, and became a passenger thereon in his line of duty, for the purpose of assisting in removing a wreck of a freight train on said railroad.

IV. That the train was in motion; and that as said train neared and approached the wreck, Grant, as the servant, agent and section boss of the defendant, being the superior of the plaintiff, with full power and authority of the defendant in that behalf, and the plaintiff being lawfully bound to obey the orders of the said Grant, agent and servant of the said defendant, and the said train being in motion and running at a swift rate of speed, the defendant, by its agent, servant and section boss, the said Grant, not regarding its duty in that behalf, and not exercising due care, carelessly, negligently and unskilfully ordered and commanded the plaintiff to jump from the train, being in motion as aforesaid, for the purpose of assisting other servants and section hands of the defendant in the line of their duty in that regard; the act of jumping from the train being extra-hazardous and dangerous, and the defendant, by its agents and servants, and by its agent and servant, the said Grant, well knowing the same, and the plaintiff being unacquainted with railway service in general, and a novice in railroad work, and being ignorant of the danger and hazard to which he was exposed by said command and orders of the said defendant, and without any fault or negligence on his part whatsoever, did, obeying said commands and orders of the defendant, jump from said train, being in motion.

V. In so jumping from the train, the plaintiff, by carelessness, negligence and default of the agents and servants of the defendant, and for want of due care and attention by the said Grant, agent and servant as aforesaid, and the said defendant, the plaintiff was violently thrown down on the embankment of the railway of the defendant, whereby the plaintiff was greatly cut, bruised and wounded, and had his leg and ankle badly fractured and dislocated, so that he became and was sick, lame, and unable to walk."

The defendant denies the material allegations of the complaint, and avers as matter of defence:

II. That if plaintiff was injured, it was through the negligent act of a fellow-servant in the employ of defendant's company, for which defendant is not responsible.

III. That the plaintiff contributed by his own negligence to his injury by jumping off a train while in swift motion, and by obeying commands which were manifestly dangerous, according to his own allegation, and by other negligent and careless acts.

IV. That the complaint does not state facts sufficient to constitute a cause of action.

At the trial, the Court submitted to the jury the following issues, to which they responded as indicated at end of each:

I. Was Grant the superior of the plaintiff as stated in the complaint, whose commands the plaintiff was bound to obey, as alleged in the complaint?

Yes.

II. Did the said Grant command or order the plaintiff to jump from the car of the defendant while it was running at a swift rate of speed?

Yes.

III. Was the plaintiff injured thereby?

Yes.

IV. Did the plaintiff know that it was dangerous to jump from the car while it was running at a swift rate of speed?

Yes.

V. Could the plaintiff, by exercising the care of a man of ordinary prudence, have known it was dangerous to jump from the car while it was running at such a rate of speed?

Yes.

What damages has the plaintiff sustained, if any?

Damages, seven hundred and fifty dollars.

Upon the findings, the plaintiff moved for judgment, but the Court gave judgment for the defendant.

It appears from the case stated on appeal, that there was evidence that the plaintiff was employed as a section hand by Grant, who was master of a section on the railroad of the defendant, between Marion and Old Fort. That he, Grant, had control of the section hands, and discharged hands, and had a right to require obedience to his orders.

The proof showed that the plaintiff was not acquainted with railroad work or trains; had been in the employ of the company only three weeks prior to the wrong complained of. That the duty of the plaintiff as a section hand, was to work repairing the road, and to man the dump-car used by the section hands; that Grant had four hands on his section, and that it required four hands to handle the dump-car used by the section hands. Plaintiff testified that he was a novice at the business; did not know the danger involved in jumping from the car while moving, the day he was ordered by Grant to jump. That Grant told Godfrey, another section hand, to jump first, but Godfrey did not jump. The plaintiff's ankle was dislocated. The physician testified that the injury was permanent.

The plaintiff stated that when witness was fixing to jump off, Grant told him to be careful, there was danger of getting hurt, but witness did not know it until he jumped off. The train was running fast. (Counsel suggested "very fast?") Witness said: Pretty fast. Witness heard Grant tell Godfrey to jump off, and he did not do it; after witness was hurt, he supposed it was because Godfrey thought there was dan-

ger in it; did not ask Godfrey why he did not jump; that when plaintiff was fixing to jump, Grant told him to be careful; that he, plaintiff, was careful as he could be: he said Terrell, the engineer, was the first to come to him after he was hurt; that Terrell then said: "Don't know what Grant was thinking about, to tell him to get off while the train was in motion"; Terrell said that Grant said he would tell one of the hands to get off and help fix the dump-car: witness knew the car was going to stop on the top of the grade.

It was in evidence that Terrell, the engineer, was that day running an extra freight; that Grant had received orders to take his men and help put on some old trucks; that Grant took two of his section hands and put them on the train at Old Fort, to be carried to the dump or section car; that the dump-car was on the side of the railroad track, about half way up the grade east of the Catawba river bridge; that before leaving Old Fort, Grant asked the engineer of the freight train to stop at the dump at Hemphill's crossing, that the section hand might get off and put the dump-car on the track, so as to accompany the freight train; that the engineer refused, alleging that he was too heavily loaded to stop on that grade, as he could not start again, and was obliged to keep on up the mountain. There was evidence on the part of the defendant, by Grant, that was contradictory of the plaintiff's testimony; that Grant told the plaintiff and Godfrey, at Old Fort, that when the freight cars stopped at the top of the grade, they would jump off and go back to the dump-car, and help put it on, and bring it to the freight train; there was evidence tending to show that the up-grade was about half a mile long, and that the dump-car was about a quarter of a mile from the top of the grade; there was evidence tending to show, when opposite the dump-car, Grant left the engine, where he had been riding from Old Fort, and came down on the coal flats, where the plaintiff

and Godfrey were sitting; that Grant commanded Godfrey to jump off and help put the dump on the track; that Godfrey did not jump. Godfrey testified that Grant then turned to plaintiff and told him to jump when he saw the train moving as slow as it would move before it got to the top of the grade; that he noticed no slacking up of the train or slower rate of speed than it was then running at, till it reached the top of the grade; that plaintiff started to jump off, and Grant went forward to the engine; that plaintiff got down on his hands and knees as near the ground as he could and jumped and was injured.

Grant was introduced for the defendant, and denied that he had given the order as testified to by plaintiff; admitted that he had told plaintiff to be careful, but said it had reference to getting off the train when it stopped at the top of the hill. Witness Grant had been many years in the employ of the railroad company; was advanced from common section hand to master of construction train. The defendant introduced the engineer, who testified that he was running as fast as he could up-grade, was heavily loaded and could not stop until at the top of the grade. Said it required skill to jump off a train in motion. That he had dressed plaintiff's leg immediately after the accident, and then conversed with him. Could not remember the words of plaintiff, but did remember the substance of what plaintiff said. The substance of conversation was that plaintiff blamed himself for jumping off the car.

The Court gave judgment for the defendant on the verdict, and the plaintiff appealed.

Mr. Jos. B. Batchelor, (*Mr. P. J. Sinclair* also filed a brief,) for the plaintiff.

Mr. Chas. M. Busbee, (*Messrs. D. Schenck* and *Chas. Price* also filed a brief,) for the defendant.

MERRIMON, J., (after stating the facts). There seems to be no well settled rule that classifies the agents and servants of a common employer, whether natural or artificial, first, into such as have authority to represent, act for and in the place of the employer in respect to the persons, business, matters and things wherewith they are charged; and secondly, such as have no such authority, but are merely fellow-servants. But without regard to such rule, there is no reason why such authority may not be specially conferred upon any such agent or servant. In this case, the burden of proving the authority—its extent and compass—by competent evidence, would rest upon the party alleging it, unless the nature of the agency or employment implied its existence and extent. Thus, an employer might confer upon a particular laborer, charged to do a particular sort of service, but who simply by the nature of his employment would have no authority to represent or bind his principal in any respect, power to employ other like laborers with himself to do the service to be done, to direct and command them when, where, and how to work, to control and superintend them, and to discharge them from employment in his discretion, although he should labor with and as one of them And there can be no question, that the employer would be answerable for the misfeasance or non-feasance of such agent in the course of his employment, and in the exercise of the power thus conferred upon him. This is so, because the agent in such case, would be expressly authorized to represent, act for and in the place of his employer in the business designated and within the compass of the power conferred.

And so in the case before us, although the section master or foreman might not have authority arising from the nature of his employment, to bind the defendant for his acts towards and his commands to his fellow-servants, yet, if the defendant conferred upon him power and authority to employ laborers—fellow-laborers with himself—to work on the sec-

tion of the road wherewith he was charged, and authority to superintend them, to give them orders and commands in the line of work to be done, which they were bound to obey, and to discharge them from such employment, in his discretion, as alleged in the complaint and as the evidence introduced on the trial tended to prove, the defendant would be liable for his misfeasance and non-feasance in the course of the exercise of his authority thus conferred by it. This is so upon the plainest principles of law applicable to and governing the relations of principal and agent towards each other and third persons.

This case is not like the ordinary one of injury done by one fellow-servant acting as foreman or leader of several or many laborers, to one of his fellow-servants. The complaint expressly alleges that the section master named, was agent and servant, and had "full power and authority of the said defendant to hire and discharge hands and servants in that behalf on said section, and who was the superior of the said plaintiff in that behalf, whose orders and commands in the line of said service as the agent, foreman and boss of the said defendant, the said plaintiff was lawfully bound to obey," and there are other similar allegations to the same effect. Evidence was introduced on the trial to prove this material allegation, and the jury found by their verdict that it was true. So it appears that the section master in this case was not simply a fellow-servant of the plaintiff, but as well the agent of the defendant, charged with authority to employ, control and command the plaintiff, as to the labor he should do on the railroad of the defendant while he was so in its service, and to discharge him from such service, just as its President or other leading executive officers might have done; and the defendant must therefore be held liable for his misfeasance in the course of his agency, just as if the same had been done by its chief executive officer. *Dobbin*

v. *The Railroad Company*, 81 N. C., 446; *Cowles* v. *The Railroad Company*, 84 N. C., 309.

We think that the principal and real issues raised by the pleadings were not submitted to the jury. Except that as to damages, those submitted involved the ascertainment of evidential facts bearing upon the issues raised. The questions of fact as to the agency of the section master—the commands he gave the appellant—the injury sustained by the latter—the knowledge of the appellant that it was dangerous to jump from the car while it was swiftly moving, and that he might by ordinary care have known this fact, were questions arising in and embraced by the issues proper, and the jury might—ought—ordinarily to have determined them under proper instructions from the Court, in passing upon the principal issues raised by the pleadings. The statute (*The Code*, §§391–398,) does not contemplate or require, that an issue shall be submitted to the jury as to every important material fact controverted by the pleadings, nor is it necessary, expedient, or proper to do so.

The principal issues—those raised by the constitutive allegations of fact—should always be submitted, and issues as to important essential facts controverted by the pleadings, may in some cases be properly submitted, but a great number of them confuse the minds of the jury, while they frequently afford one side or the other opportunity to magnify and give undue weight to a particular fact, and, sometimes, obscure the main issues. This should be guarded against.

It seems to us that the principal issues presented by the pleadings, in addition to that as to damages, were: 1st. Was the plaintiff injured and endamaged by the default and negligence of the defendant? 2d. If so, did the plaintiff by his own default and negligence contribute to the injury he so sustained? These would have brought out the whole merits of the matter in litigation. The complaint alleges important evidential facts, denied by the answer, and thus issues

are raised. Surely such issues are not to be submitted to a jury. Only the issues raised by the constitutive facts alleged on one side and denied by the other in the pleadings, should be so submitted. *McElwee* v. *Blackwell*, 82 N. C., 345; *Miller* v. *Miller*, 89 N. C., 209; *Overcash* v. *Kitchie*, Ibid., 384; *Swann* v. *Waddell*, 91 N. C., 108.

The Court denied the appellant's motion for judgment upon the verdict of the jury upon the issues submitted to them, and gave judgment for the appellee.

Although it does not appear so affirmatively, it does by implication, that it decided upon the findings upon the fourth and fifth issues, that there was contributory negligence on the part of the appellant, and based its judgment upon this principal ground, and, probably, upon the further ground, that the injury was occasioned by the act of a fellow-servant. We have already seen that the latter ground was unfounded.

It appears that the section master was actively prosecuting the work of the defendant he had charge of, and he, and by his command, the plaintiff and another fellow-servant in that connection, got upon a passing freight train, to go some distance to a place where proper work was to be done. The train was heavily laden and going swiftly—how swiftly does not appear—up an ascending grade half a mile in length. While it was thus moving, and passing by the place where the work referred to was to be done, the section master commanded the appellant to jump from the train, which command he at once obeyed, and in doing so, sustained the injury because of which he complains in this action. It seems that this command was given and promptly obeyed, without hesitation. It was rash, negligent, unreasonable and unwarranted, but the danger to be encountered in obeying it, was not so manifest and so great, as under the circumstances, to render a prompt obedience to it contributory negligence on the part of the appellant. An ordinary laborer on railroads—

one of ordinary experience—might make a leap without injury—he might not unreasonably believe that he could, taking proper care, and especially so, when commanded to do so by a railroad employé of long experience, who had the right to command him in the course of his duty. While to jump from a rapidly moving train of cars is very hazardous, and ordinarily to do so, is negligence, it is not contributory negligence where the plaintiff—a laborer on the railroad—is suddenly commanded by his employer or its agent to do so, in the course of his employment, and the command at once obeyed from a sense of duty, and without waiting to think of and consider the hazard.

Such a case is exceptional. The agent of the employer suddenly commands the laborer to do an extra-hazardous act in the course of his duty—one that *may*, though not probably, be safely done by observing due care—one that must be done at once, if done at all. The laborer obeys the command promptly, nerved only by a faithful sense of duty, and as a consequence suffers serious bodily injury. In that case, the injured party does not, in legal contemplation, contribute to his own injury. The facts and circumstances were such as that he might, when suddenly called on, not unreasonably believe that the command was a proper one, that he ought to obey. Although the act was hazardous, it was not essentially dangerous. It was done suddenly and in obedience to the command of one who had the right to direct the laborer in the course of his duty. The latter had but a moment to think of duty—a moment to think of danger. The law attributes the injury in such case, to the negligence of the employer; its agent gave the unwarranted, negligent command, the injured party simply obeyed, and was not negligent because under the circumstances he did obey. It would be unreasonable and unjust to allow the employer to have immunity from civil liability for its own negligence,

or that of its agent, thus resulting in injury to a faithful servant.

We therefore think the Court erred in deciding that the appellant could not recover because of his contributory negligence.

The appellant might insist upon a new trial, but he asks only that judgment be entered here upon the verdict of the jury in his favor. We think he is so entitled.

The judgment of the Superior Court must therefore be reversed, and judgment entered here upon the verdict for the appellant. It is so ordered.

Error. Reversed.

STATE ex rel. MILTON McNEILL v. JAMES F. SOMERS.

Officers—County Commissioners.

1. Whether the duty of the County Commissioners of inducting persons who have received a certificate of election into office, is merely ministerial or not; *quære*, but if the commissioners refuse to induct one who is plainly ineligible, the Courts will not compel them to do so, and thus put one into an office which he cannot constitutionally hold.
2. The right given by the statute to a sheriff to collect the taxes for which he is accountable, after he has gone out of office, does not bring him within the inhibition of Art. 14, §7, of the Constitution, so as to render him ineligible to hold another office.
3. Where the statute imposes certain duties to be performed by an officer after the expiration of the term of office, their performance does not constitute a place or office of trust or profit so as to disqualify the former officer from holding another office at the same time.

(*Worthy* v. *Barrett*, 63 N. C., 199; *Morton* v. *Ashbee*, 1 Jones, 312; *Jones* v. *Arrington*, 91 N. C., 125; *Doyle* v. *Raleigh*, 89 N. C., 133; *In re Martin*, Winston, 153; cited and approved).

McNEILL *v.* SOMERS.

CIVIL ACTION, in the nature of *quo warranto*, tried before *Boykin, Judge*, on a case agreed, at Spring Term, 1887, of WILKES Superior Court.

This action, brought with leave granted by the Attorney General, by the relator, under *The Code*, §608, is to try title to the office of clerk of the Superior Court of Wilkes county, to amove the defendant therefrom, upon an alleged usurpation, and to secure the plaintiff's induction, was tried at March Term, 1887, upon the following case agreed:

1. The relator, Milton McNeill, and the defendant James C. Somers, were candidates for the office of Clerk, in 1886, and both were voted for at the election held on the 4th of November of that year. McNeill received a majority of the qualified votes, and on the 6th of November was declared duly elected for four years from and after the first Monday in December, 1886, by the Board of Canvassers.

2. On the first Tuesday in November, 1884, McNeill was elected sheriff of Wilkes county, and on the first Thursday thereafter, declared by the canvassers to have been duly elected to said office for two years from the first Monday in December, 1884, on which day he appeared before the county commissioners, filed bonds as required by law, and was inducted into the office of sheriff. On the first Monday in December, 1885, he appeared again before the commissioners and renewed his official bonds—one being the bond for collection of State and county taxes; and on the 1st of September, 1886, as sheriff, he received the tax books for taxes levied for the year 1886, with authority from the board of commissioners to collect the same. On the first Monday in December, 1886, and at the time of election, and also at the time he appeared to qualify, he held the said tax books, and was actually engaged in collecting the taxes, a large portion of which was at said date uncollected.

At the November election, 1886, one John E. McEwen was elected sheriff for two years from the first Monday in Decem-

ber, 1886, at which latter date he appeared and tendered the required bonds to the Board, which were accepted, and he qualified as sheriff, and was inducted into the office on that day, which office he still holds and exercises.

4. On the same day, to-wit, the first Monday in December, 1886, the relator, McNeill, appeared before the Board of county commissioners, and produced a certificate of the clerk of the Board of Canvassers, which declared he had been elected clerk of the Superior Court for four years; tendered his official bond in the penal sum of ten thousand dollars, with proper conditions for a bond of the clerk of the Superior Court, signed by himself as principal, and others as sureties, and justified to over the sum of forty thousand dollars, and asked to be qualified and inducted into office; that said Board considered the application and declined to allow the same, and rendered the following order, setting forth their reasons for declining:

"In the matter of Milton McNeill: This case being heard on the application of M. McNeill to be inducted into the office of clerk of the Superior Court of Wilkes county, he having been declared to be duly elected by the Canvassing Board, on the 4th of November, 1886; and it appearing that said Milton McNeill did, as sheriff of Wilkes county, on the first Monday in December, 1885, execute a good and sufficient bond for the collection of State and county taxes due for the year 1886, and that his authority to collect the same had not terminated; it is therefore considered and adjudged by the Board of Commissioners of Wilkes county, that said McNeill is ineligible to the office of clerk, by reason of his being tax collector of Wilkes county, the same being an office or place of trust or profit within the meaning and purview of Article XIV., §7, of the Constitution of the State, which provides that no person can hold two offices or places of trust or profit at the same time. In other words, Milton

McNeill cannot be tax collector and clerk of the Superior Court of Wilkes county at one and the same time."

5. That said Board informed the resident Judge of the district (Judge Graves) of their action, who declared the office of clerk vacant, and appointed the defendant Somers to fill the vacancy until his successor should be duly chosen and qualified; and under this appointment, the defendant appeared before the Board on the first Monday in January, 1887, and tendered his bond, which was accepted, and he was duly qualified and inducted into the office of clerk of the Superior Court of Wilkes county, and continues to hold and exercise the same under said appointment, as he claims he has the right to do.

The Court gave judgment for the plaintiff, and the defendant appealed.

Messrs. D. M. Furches and *R. F. Armfield*, for the plaintiff.

Messrs. Jos. B. Batchelor, John S. Cranor and *John Devereux, Jr.*, (*Mr. G. N. Folk* also filed a brief,) for the defendant.

Smith, C. J., (after stating the facts). In the constitutional amendments adopted in 1835, by a ratifying popular vote, is the following: "No person who shall hold any office or place of trust or profit under the United States or any department thereof, or under this State, or any other State or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly,"—with a *proviso* exempting officers in the militia, and justices of the peace from its operation; Art. IV., §4. This was omitted in the superseding Constitution of 1868, and a brief declaration substituted, that "no person shall hold more than one *lucrative* office under the State at the same time," with an extension of the *proviso* to certain commissioners; Art. XIV., §7. But it was replaced, as now found in the

organic law, by the action of the General Assembly in 1873; Acts 1872–'73, ch. 88.

It was under a supposed incompatibility of the office to which the relator had been elected, with the functions he retained and was exercising in the collection of taxes, that induced the Board of Commissioners to refuse to admit him to the office of clerk, and to certify to the Judge their action in the premises, in consequence of which, as a declared vacancy, the defendant was appointed to fill it.

In *Worthy* v. *Barrett*, 63 N. C., 199, the commissioners in a similar manner, refused to induct the plaintiff into the office of sheriff to which he had been regularly elected, because of the disability imposed by the 14th amendment made to the Constitution of the United States, and a remedy was sought in the writ of mandamus. In commencing the opinion, Reade, J., who spoke for the Court, uses this language: "It is insisted for the petitioner, that the county commissioners of Moore county have no power to inquire as to his qualifications; that their duty is to administer to him the oath prescribed by law, and to receive his bond; that their duty is merely ministerial, and involves the exercise of no discretion, and that the Court will enforce its performance by mandamus, and leave the petitioner's right to hold the office to be tested by proceedings under a *quo warranto*. The solemn act of administering an oath and inducting into office, *may not be merely ministerial*. But if it were, the Court will not compel them to do wrong, if it be clear that they did right."

Accepting this ruling, that whether the authority assumed by the commissioners to pass upon the qualifications of the relator be rightful or not, when the facts are not disputed or are plainly manifest, the Court will not by its action put him in a place he cannot lawfully hold, our only present inquiry is, as to his competency under the clause of the Constitution recited, to enter upon and discharge the duties of

clerk, when exercising the function of collecting the taxes on the list delivered to him while he was sheriff. We do not so interpret the law, nor, in our opinion, does the prolonged authority, given by statute, to proceed in the collection of taxes for which he is accountable, after the expiration of the term of office, constitute an "office or place of trust or profit" according to the true meaning of those words. The office of sheriff was then filled, or about to be filled, by a newly elected successor, and the relator's term had expired. He was no longer "*in office*" nor did he occupy a "*place of trust or profit*," but was simply engaged in completing an unfinished duty, which survived the termination of the office before held.

The continued right to coerce payment of unpaid taxes, after, as before the determination of the office, may be, and indeed is, the correlative of the obligation to account for what is on the tax list, that is, of an *official duty*, but it remains detached from the office to which it was incident, a separated function, but it is not itself an office or place of trust or profit. There can be but one incumbent of a single office, and the one term being ended, the other is filled by a successor. The distinction is between the office, and the prolonging of the exercise of one of its functions after its determination for all other purposes.

Thus the sureties on the sheriff's bond are allowed, in case of his death during the time appointed for collection, to proceed to collect, and are for this purpose invested with the same powers and means for coercing payment. Acts of 1885, ch. 177, §55.

Numerous enactments, indeed they are common at every session of the General Assembly, extend the time and prolong the power to collect arrears from delinquent tax-payers for several years, and this right has been conferred upon an administrator of a deceased sheriff, and the validity of the act sustained, in *Morton* v. *Ashbee*, 1 Jones, 312. See also

Jones v. *Arrington*, 91 N. C., 125, where the subject is fully discussed.

Now, in these cases, will it be seriously contended that the sureties or the personal representative, when exercising the bestowed function of collecting, are in an office or place of trust or profit? So, where the sheriff shall go out of office before executing a deed conveying property sold under execution, he may still make it. But this retained power does not make him an officer. So in numerous other cases of extended authority to exercise some official function after the termination of the office,—that is, to discharge some assumed but uncompleted duty.

What is meant by "places of trust or profit" in the Constitution, is considered in *Doyle* v. *Raleigh*, 89 N. C., 133; and we do not propose to add to what is there said.

The incompatibility of the duties appertaining to the office of clerk and that of tax collecting, is urged in the well considered brief prepared by counsel for the defendant. But conflicts, if such they may be called, of this kind, are not uncommon, and hence deputies are allowed to aid in the performance of ministerial duties merely. But this does not make the functions so incompatible as to obstruct the entry into office, as was held *In the matter of Martin*, Appendix Wins. Rep., 153.

There is no error. This will be certified to the Superior Court of Wilkes.

No error. Affirmed.

ALEXANDER JACKSON v. JOHN A. McLEAN.

Arbitration and Award—Amendment—Recitals in Judgments.

1. Where an agreement to submit the matters in controversy in a pending action is made out of Court, and no order of Court is made to make the award when filed a rule of Court, the Court has no power to enter a judgment on the award, but the remedy is by a new action on the award.
2. An amendment which introduces a cause of action which arose after the action was begun cannot be permitted. So where a submission to arbitration of the matters in controversy in a pending action was made by an agreement *in pais*, the plaintiff cannot amend his complaint so as to declare on the award which has been filed in his favor.
3. The recitals in a final judgment cannot change the force and effect of an order made in a previous stage of the action.

(*Lusk* v. *Clayton*, 70 N. C., 184; *Simpson* v. *McBee*, 3 Dev., 532; *Gudger* v. *Baird*, 66 N. C., 438; *Moore* v. *Austin*, 85 N. C., 179; *Metcalf* v. *Guthrie*, 94 N. C., 447; cited and approved).

CIVIL ACTION, heard before *Boykin, Judge*, at January Term, 1886, of ROBESON Superior Court.

This action was brought at the Spring Term, 1883, of the Superior Court of the county of Robeson, to recover the possession of the personal property mentioned and described in the complaint, the plaintiff availing himself of the provisional remedy of claim and delivery, at the time the summons issued.

At the appearance Term of the Court, the complaint and answer were filed. The case was afterwards continued from term to term, until at the Fall Term, 1885, an entry appeared on the record in these words: "By agreement of parties, referred to J. A. McAllister and L. T. Everett to act as arbitrators."

But pending the action, and before the last mentioned Term, on the 11th day of June, 1884, the plaintiff and the

defendant, and the defendants in sundry other actions wherein the present plaintiff was plaintiff, agreed *inter partes* in writing, "to and with each other, to submit all and all manner of actions, suits, controversies, claims and demands whatsoever, now pending, existing or held by and between the said parties in the Superior Court of Richmond and Robeson counties, to L. T. Everett, of Laurinburg, N. C., and J. A. McAllister, of Lumberton, N. C., as arbitrators, who shall arbitrate, award, order, judge and determine of and concerning the same; and we do mutually covenant and agree to and with each other, that the said award to be made by the said arbitrators, shall be final, and in all things by us be well and faithfully kept, performed and observed; that if the said arbitrators shall disagree, they have power to call in an umpire who may act with them and decide any questions, aided by the vote of one of the arbitrators, upon which they may be divided."

Pending this reference, by consent of the parties, and before the referees named, F. W. Kerchner, Robert Calder and William Calder became parties defendant in this action, and filed before the referees or arbitrators an answer to the complaint, to which the plaintiff made reply, and they were made parties to and signed the agreement to arbitrate as above mentioned.

In the action of the present plaintiff against McLean & Leach, pending in the same Court, and embraced by the agreement to arbitrate, at Spring Term, 1885, this entry appeared: "Under arbitration and award." At the next subsequent August Term, this entry appeared: "Continued under former order." At the next subsequent Fall Term, this entry appeared: "Notify arbitrators to proceed—continued under former orders."

The arbitrators named in the submission, made their award on 2d December, 1885, and immediately filed the original thereof, with the agreement to refer, in the clerk's office,

in the papers constituting the record of the suits which were pending and referred in the Superior Court of Robeson county, and also filed immediately a duplicate original of said award and agreement, in the clerk's office, in the papers constituting the records of the suits referred which were pending in the Superior Court of the county of Richmond.

The material part of the award concluded as follows:

"The arbitrators aforesaid, do hereby award and adjudge that the plaintiff, Alex. Jackson, do recover of the defendants, Kerchner & Calder Bros., the sum of fifteen hundred dollars, with interest thereon from the 1st day of November, 1882, until paid, together with the cost in all the actions pending between the said plaintiff and defendant in Richmond and Robeson, and the costs of this arbitration."

It was admitted that the agreement to refer the matter in litigation between the parties to the various suits was made by them out of Court.

Plaintiff moved for judgment in accordance with report of the arbitrators.

The defendants resisted the motion for judgment upon the award mentioned, mainly upon the ground that it was not made under or in pursuance of any order of reference of the Court, but was made under an agreement to arbitrate and settle sundry matters in dispute and in litigation, embraced by numerous actions in Court between the present plaintiff and numerous different defendants in the actions referred to, which agreement was made out of and not with the sanction of the Court.

The Court gave judgment, of which the following is a copy:

"This cause coming on to be heard, and it appearing to the Court, that the award made by the arbitrators heretofore appointed in the above cause by this Court, was by the consent and agreement of the parties, and it further appearing that the above named defendants, Kerchner & Calder Bros., have

made themselves parties defendant to this action, and no exceptions having been filed to said award, it is ordered and adjudged that said award be in all things confirmed, and accordingly that the plaintiff recover of the defendants F. W. Kerchner, William Calder and R. C. Calder, partners doing business under firm name of Kerchner & Calder Bros., the sum of fifteen hundred dollars, with interest thereon from the first day of November, 1882, together with the costs named in said award, to be taxed by the clerk of this Court."

The defendant having excepted appealed to this Court.

Messrs. T. A. McNeill and *W. H. Neal*, for the plaintiff.
Messrs. Wm. Black and *W. F. French*, for the defendant.

MERRIMON, J., (after stating the facts). It seems that the Court below treated the agreement of the parties to this action to arbitrate the matters in litigation, as being an order of reference, made by the Court by consent of the parties in writing, to try the issues of fact and law arising in the action, as allowed by the statute, (*The Code*, §420). We think it very clear that agreement cannot be so treated. It was not made in Court, but out of Court, not in pursuance or by authority of any order of reference, nor is there any order or entry recognizing it as having been made with the sanction of the Court. Indeed, there is a total absence of any order or entry in respect to it. The entry made subsequent to the agreement, "under arbitration and award," and similar entries on the record in other actions referred to, seem to have been intended as mere suggestions on the record of a cause sufficient for the continuance, that the parties were settling the matters in litigation "out of Court." Moreover, the terms of the agreement to arbitrate, do not embrace simply the matters in litigation—the issues of fact and law—in this action. They embrace "all manner of actions, suits, con-

troversies, claims and demands whatsoever now pending, existing or held by and between the parties to it," embracing numerous actions in different Courts. The agreement of the parties out of Court, to allow new parties to be made, and additional pleadings before the arbitrators, could not affect the action, because it did not have the sanction of the Court at the time it was made, or afterwards, so far as appears. The agreement to arbitrate, and the award in pursuance of it, made out of Court and with which the Court had no connection or relation, could not be enforced in this action, unless by consent, although the failure to observe and keep the terms of the agreement might be a cause of action in a new and independent action. The Court could not in this action obtain jurisdiction of the new cause of action, unless by consent of all the parties. No doubt it might in that case.

It is the order of reference that extends the jurisdiction and controls the relation of the Court to the trial by referees of the issues of fact and law—one or both—or to an arbitration and award, as to the matter in dispute, by consent of parties, under the order of the Court, and extends its authority to compel the parties to the action, by proper judgments and orders in the regular course of procedure, to do and submit to what ought to be done as the just result of the reference. Hence, when there is an order of reference in an action, by consent of the parties in writing, to try the issues of fact or law, or both, as allowed by the statute, (*The Code*, §420,) and the referees make their report, it stands "as the decision of the Court, and judgment may be entered thereon upon application to the Judge." In such case, if either or any party shall object to the action of the referees, he must do so in the course of the trial before them, as directed by the statute, (*The Code*, §422,) else he will be concluded, if the objection be one that ought to be then made. In such case, the Court can, and will compel the parties to a

due observance of the terms and effect of the reference, and all proper proceedings, reports, orders and judgments consequent thereupon. Such a reference is of and part of the action. And so in this case, if there had been a proper order of reference, the plaintiff might have been entitled to judgment, but as we have seen, there was none.

It is clear there was no such reference in this case as that above mentioned. The Court might, in the exercise of its general power, by consent of parties, have referred the matters in litigation to arbitrators, providing that their award should be a rule of the Court. In that case the Court might —would—in a proper case, compel the parties to submit to the award. *Lusk* v. *Clayton*, 70 N. C., 184; *Simpson* v. *McBee*, 3 Dev., 532; *Gudger* v. *Baird*, 66 N. C., 438.

It is otherwise, however, and for the reasons already stated, when there is no such order of reference, and the parties agree out of Court, and without its sanction, to arbitrate. *Simpson* v. *McBee*, *supra*; *Moore* v. *Austin*, 85 N. C., 179; *Metcalf* v. *Guthrie*, 94 N. C., 447.

In the latter case, the party complaining can only find a remedy in another action. He cannot successfully obtain leave to file an amended complaint, and allege the new cause of action created by the award, because it arose after the pending action began. And if the award settled and concluded the cause of action, and the plaintiff should prosecute the same further, the defendant might, by amended answer, plead that the cause of action had been settled and merged in the award, and thus defeat the plaintiff's recovery.

It is recited in the judgment appealed from, that "it appearing to the Court that the award made by the arbitrators heretofore appointed in the above cause by this Court was by the consent and agreement of the parties," &c. This recital cannot be regarded as conclusive or sufficient, because it relates to an essential order, which, to have force and effect, must appear in the record. If the Court in fact appointed

the arbitrators by the consent of the parties, and a proper order of reference was really made in that respect, then the Court ought to have directed the entry of it *nunc pro tunc*.

But it seems that this recital was based upon the fact that the agreement to arbitrate, was referred to once or twice in the record, as a reason for the continuance of the action. As we have seen, such casual, indefinite entry, without connection other than such as appears, could not be treated as even a memorandum of a proper order of reference, especially, as the written agreement to arbitrate makes no mention of or reference to any order of reference or appointment of arbitrators by the Court. Besides, it is stated in the case settled on appeal, "that the agreement to refer the matters in litigation between the parties to the various suits, was made by them out of Court," and it appears, that it was made many months before the Court took notice of it in the record.

Therefore we think the Court erred in giving judgment for the plaintiff upon the report and award mentioned in the record. The judgment must be set aside, and further proceedings had in the action according to law. To that end, let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. Reversed.

J. R. CUTHBERTSON v. THE NORTH CAROLINA HOME INSURANCE COMPANY.

Issues—Assignment of Error—Insurance—Application.

1. It is not every matter alleged on the one side and denied on the other that raises an issue to be submitted to the jury, but only such allegations and denials as involve facts necessary to the determination of the controversy.

2. The form in which issues are submitted is of little consequence, if the material facts in controversy are clearly presented by them, but all unnecessary and immaterial issues should be avoided, as they tend to confuse and mislead the jury.

3. In an action on a policy of insurance wherein several distinct articles are insured, it is not proper to submit separate issues as to the value of each separate article.

4. The submission of immaterial issues, when not prejudicial to the appellant, cannot be assigned as error.

5. The application for insurance forms a part of the contract, and the inquiry and answers are tantamount to an agreement that the matter enquired about is material, and its materiality is not open to be tried by the jury.

6. In the absence of fraud or mistake, a party will not be heard to say that he was ignorant of the contents of a writing signed by him, containing a contract on his part.

7. So where a party signed an application for insurance which contained a warranty that the property belonged to the applicant in fee, and that there were no liens on it, he will not be allowed to testify that he did not know that such a fact was stated in the application.

8. Where an application for insurance contained a statement which was made a warranty by the terms of the policy, that the house in which the insured property was, belonged to the applicant in fee, and that there were no liens on the property insured; *It was held*, that the warranty was broken when it appeared that the house was built on land leased by the applicant, and was to become the property of the lessor at the end of the lease, and that the title to the property insured was vested in another person as a security for the purchase money.

9. Where several distinct kinds of property are insured in the same policy, and there is a false statement in the application as to some of it, it avoids the policy as to all, as the policy is one entire and indivisable contract.

(*Cedar Falls Co.* v. *Wallace*, 83 N. C., 227; *Albright* v. *Mitchell*, 70 N. C., 445; *Bobbitt* v. *The Insurance Co.*, 66 N. C., 70; *Biggs* v. *The Insurance Co.*, 88 N. C., 141; cited and approved).

CIVIL ACTION, tried before *Avery, Judge*, at Spring Term, 1886, of UNION Superior Court.

There was a judgment for the defendant, and the plaintiff appealed.

The facts appear in the opinion.

Mr. D. A. Covington, for the plaintiff.
Mr. Platt D. Walker, for the defendant.

DAVIS, J. On the 17th day of November, 1882, the defendant company, for value, insured certain property of the plaintiff against loss by fire, for three months, beginning at 12 o'clock, M., on that day, and issued to him a policy therefor, in the sum of $1,000. On the night of February 16th, 1883, while said policy was in force, a portion of the property embraced therein was destroyed by fire, worth, as plaintiff alleges, the sum of $1,000; which sum, though demanded, the defendant company refuses to pay, and this action is brought for its recovery.

The application and policy of insurance are set out in the pleadings.

The defendant denies the right of the plaintiff to recover, and says that he did not have such an ownership of, or interest, title and estate in the property described in the policy as was represented by the plaintiff in his application.

For a further defence, the defendant says, that the plaintiff in his application, which was a part of the contract, represented that he was the sole and absolute owner in fee, of the property insured, and that there were no liens, incumbrances, or claims whatever against it, and that in response to questions propounded, the plaintiff failed to disclose fully and truly, his interest in said property, and that he was not the sole and absolute owner thereof.

It is stipulated in the policy, that in the event of loss, suit or action for the recovery of any claim by reason thereof, shall be commenced within one year, and the defendant

says this action was not commenced within one year, as required by the said provision.

The property is described in the policy, with its value and the amount insured, respectively, as follows: Gin-house, value $250, insured for $108; two gins and one feeder, $350, $153; seed-cotton in gin-house $150, $63; loose lint cotton $50, $19; cotton seed $75, $31; steam engine and boiler, located about twelve feet from gin-house, $1,000, $231; belting and shafting $175, $75; grist mill and fixtures $200, $80; saw-mill and fixtures $350, $153; cotton-press in gin-house $190, $81.

The plaintiff tendered the followiwg issues at the close of the evidence:

1. Did the plaintiff at the time of his application for insurance, and at the time his policy was issued thereon, have such an interest in the property insured or any part therof, as was the subject of insurance; if so, what part?

2. Did the plaintiff at the time of his application make any false representation as to his ownership of said property or any part thereof; if so, what part?

3. Did the plaintiff at the time of his application make any false representation as to any lien, incumbrance or claim on said property or any part thereof; if so, what part?

4. Did the plaintiff comply with the conditions and stipulations of the contract of insurance on his part?

5. How long after the plaintiff's cause of action accrued before this suit was brought?

6. Is the defendant indebted to the plaintiff in any sum under the said policy of insurane; if so, how much?

His Honor refused to submit these issues, and in lieu thereof submitted, among others, the following:

I. Was the plaintiff, at the time when his application for insurance was made, the sole and undisputed owner of the engine and boiler, the belting and shafting, and the saw-

mill and smoke-stack, holding them free of any claim or incumbrance, as represented in the application?

III. Was the plaintiff at said time, the undisputed owner of the gin-house mentioned in said application and policy?

VI. Did the plaintiff commence this action within the time limited for the commencement thereof, by the contract of insurance?

The plaintiff excepted to the refusal to submit the issues tendered by him, and to the 1st, 3d and 6th issues submitted by the Court, and this is the first error assigned.

The issues are made by the allegations of the complaint and denials of the answer, and should be only such as are necessary to determine the controversy between the parties. Often questions of fact are alleged and denied, which, whether found one way or the other, do not in themselves, decide the *issue* or *issues* involved, and it is not necessary, but often improper, to submit such questions of fact to the jury.

In *Cedar Falls Co.* v. *Wallace*, 83 N. C., 227, DILLARD, J., approving *Albright* v. *Mitchell*, 70 N. C., 445, says: "It is not every matter alleged on one side and denied on the other, that in a legal sense is an issue, but only such as are necessary to dispose of the controversy; and to such necessary matters, the issues submitted ought to be confined as far as possible, in order to avoid embarrassment and confusion to the jury from a multiplicity of issues."

The form in which issues are submitted is of little consequence, if the matters in controversy are clearly and fairly presented by them to the jury, but all immaterial and unnecessary issues should be avoided. In this case, eleven issues were submitted, some of them relating to the ownership of different portions of the property mentioned in the application for insurance, and to the value of separate parts of it, and which do not, however found, decide the controversy, but no exception was taken to them, and unnecessary

issues are not assignable for error, if not prejudicial, even if excepted to, and we only allude to it here, to suggest that in framing issues for the jury, only those presented by the pleadings which are decisive of the matters in controversy should be submitted, and under proper instructions from the Court, these may often be greatly narrowed.

In this case, the isues submitted by the Court in lieu of those tendered by the plaintiff, though several of them may be unnecessary, present fully the matters in controversy. The 1st, 3d and 6th, only are objected to, and these relate to material facts alleged and denied, and the exception cannot be sustained. We can see no error in rejecting the issues proposed and the substitution of those submitted.

Among the questions propounded in the application for insurance and the answers thereto, were the following:

1. "Are you the sole and undisputed owner, absolutely and in fee simple, of the said property as severally mentioned, and of the land on which it stands?

2. "If not, state fully what your interest is? Answer—"All but the land."

3. "Is there any lien or incumbrance in, or any claim whatever against the said property? Answer—No."

At the foot of the application and next preceding plaintiff's signature thereto, is the following:

"I affirm and warrant that the foregoing answers are true, and that they shall constitute the basis of the policy that may be issued to me on this application." Signed by J. R. Cuthbertson.

The plaintiff proposed to prove, that the questions referred to were in fact not asked, and that he signed the application without knowing that it contained them. This was objected to, and the objection sustained, and this is excepted to. It is conceded that the plaintiff could read and write, and that he signed the application with his full name. That the application forms a part of the contract, is clearly estab-

lished by authority. *Bobbitt* v. *Ins. Co.*, 66 N. C., 70, and the authorities there cited.

The applicant warrants the answers to be true, and the warranty enters into and forms a part of the contract. May on Insurance, §183.

The same author says, §185: "The inquiry and answers are tantamount to an agreement that the matter inquired about is material, and its materiality is not therefore open to be tried by the jury"; and for this he cites many authorities. There was no error in excluding the proposed evidence. In the absence of fraud or mistake, a party will not be heard to say that he was ignorant of the contents of a contract signed by him.

There was evidence in regard to the third issue, and it was discussed at length before us, but the view which we take of it, it was immaterial whether the action was brought in proper time or not, as the plaintiff is not entitled to recover on the finding of the other issues, and we consider the only remaining alleged error, which was in regard to the instructions of his Honor to the jury upon the first issue.

The only evidence upon this issue was that of the plaintiff, who testified: "That the gin-house was built by him on the land of McLeod, he having leased it for three years, and that it was agreed between him and McLeod that plaintiff might build the house and use it during his term, and that at the end of the three years or of the term, or if extended at the end of the extended time, the house should remain on the land and belong to McLeod; that at the time of the fire, one half of the time had expired, and there was no agreement made for an extension; that he bought the engine, boiler, smokestack, saw-mill, belting and shafting from the Taylor Manufacturing Company under a written contract of sale, by which the title to said property was to remain in said company until the purchase money was fully paid; that only part of it had been paid at the time of the application and

at the time of the fire." The Court instructed the jury, that if they believed this evidence they must respond, "No," to the first issue.

The alleged error in this charge is not pointed out, and we can discover none.

The jury responded "No," to the first issue, and in response to the other issues, they found that the plaintiff was not the owner of the gin-house, and that he was the owner of the two gins and feeder, and of the seed and lint cotton, cotton seed, belting, shafting and cotton-press; that the value of the house was $250; the gin, $100; the cotton, belting and shafting, $370.50; the engine, boiler, &c., $1,000.

Upon this verdict there was a judgment for the defendant.

It was insisted in this Court, that the contract was not entire, but divisable, and that the plaintiff was entitled to so much of the insurance as covered the property which was owned by him, notwithstanding the finding of the jury upon the first issue. The question is considered, and the decisions bearing upon it are reviewed, in May on Insurance, §§277, 278, and the conclusion to be drawn from them is, that a misrepresentation or breach, when the contract is entire, affects all the property insured, though it may be of different kinds and separately appraised in the policy; and this view is sustained by the ruling of this Court in *Biggs* v. *Ins. Co.*, 88 N. C., 141.

The jury find that the plaintiff was not the owner of a portion of the property, of which, in his application, he represented himself to be the owner, and this misrepresentation as to his interest avoids the policy; Wood on Insurance, §179; May on Insurance §287; and *Bobbitt* v. *Ins. Co., supra.*

There is no error, and the judgment must be affirmed. Let this be certified.

No error. Affirmed.

LUCINDA EFLAND v. JOHN W. EFLAND et als.

Dower—Equitable Jurisdiction of the Superior Courts—Seizin.

1. While the assignment of dower is a Special Proceeding of which the Clerk has jurisdiction, yet if any equitable element is involved, which under the former practice would have been cognizable in a Court of equity, the Superior Court in term has jurisdiction, and the application for dower becomes a civil action.

2. Where an action was brought by a widow, alleging that the legal title to certain land was in the defendants, but that they held it in trust for her deceased husband, and asking that they be declared trustees and that her dower be assigned in the land: *It was held*, that the Superior Court in term, and not the Clerk, had jurisdiction.

3. A widow is not entitled to dower in an equity, unless the husband had such an equitable estate as could be enforced in a Court of equity.

4. Possession alone does not constitute such a seizin as is necessary to support a claim for dower.

5. Where land was purchased and paid for by the husband, but the deed was made to a third party in order to defraud the creditors of the husband, he has no such seizin as will support a claim for dower on the part of his widow, although he was in possession of the land; but where land of which the husband was seized during coverture was sold at execution sale, and purchased by a third party with the money of the husband, and the title was made to the purchaser, with a like intent to defraud, the wife is entitled to dower.

(*Campbell* v. *Murphy*, 2 Jones Eq., 359; *Jones* v. *Gerock*, 6 Jones Eq., 190; *Pollard* v. *Slaughter*, 92 N. C., 81; *Tate* v. *Powe*, 64 N. C., 684; *Rhem* v. *Tull*, 13 Ired., 62; *Barnes* v. *Raper*, 90 N. C., 189; *Dobson* v. *Erwin*, 1 Dev. & Bat., 573; cited and approved).

This was a CIVIL ACTION, tried before *Clark*, *Judge*, at February Term, 1886, of GUILFORD Superior Court.

Levi Efland died intestate in the county of Guilford in October, 1882, and the plaintiff is his widow and the defendants are his children and heirs at law. The complaint alleges, among other things, that Levi Efland, was, at the time

of his death, and had been for several years previous thereto, in the undisputed possession of two tracts of land described in the complaint. That one of said tracts was sold at public auction about ten years ago by the executors of one George Smick, and bid off by the defendant Geo. W. Efland, in pursuance of an agreement between him and his father, Levi, and paid for by the said Levi, and the deed made by his direction to the said George for the use and benefit of the said Levi, who immediately took possession of the land, paid the taxes thereon, and used it as his own.

That the said Levi was seized of the second described tract on the 7th day of March, 1881, on which day the sheriff of Guilford sold the same under execution against the said Levi, when the land was bought by the defendant George W. for his father, under an agreement theretofore made between them to that intent and purpose, and the said Levi paid the purchase money and took a deed from the sheriff to the defendant Ellen Efland, for said land, for his own use and benefit, as was understood and agreed by and between them, and the said Levi continued in the use and possession of the said land as he had always done before, until the time of his death, without any claim by the said Ellen to hold the same for her own use or benefit.

That although the title to the said tracts of land were made, one of them to the defendant George, and the other to the defendant Ellen, yet the said defendants never paid anything therefor; that neither of them had the means or ability to purchase and pay for said land, and that the equitable estate therein was in her husband at the time of his death. That the plaintiff is entitled, as the widow of the said Levi Efland, to have dower in said land, and has demanded of the defendants to allot and set apart to her her dower therein, but that they deny the equitable estate of the said Levi, claim to hold said land free from said equities, and refuse to allow her right to dower, and she asks that the said George

and Ellen be declared trustees, &c., and that she be adjudged entitled to dower, &c.

The defendants, except John W. Efland and William Brown, answer the complaint, and deny all the material allegations therein, and among other defences, say that small sums were advanced by Levi Efland to George W. and Ellen, but the deeds were made to them, with a view on the part of the father, of secreting the same, and to secure his estate and effects from his creditors, being at the time considerably indebted on his own account and as surety, but with no purpose in any way to defraud the plaintiff, and the allegation that the "plaintiff has a right to dower in any of said land is denied, and the defendants aver that all sums of money advanced toward the payment for these two tracts of land, were with the view and purpose on the part of the said Levi, to advance his said children, and to secure his estate from his creditors."

"For a second defence, relying on the first as if fully herein set out, the defendants suggest that this Court has not jurisdiction of this cause, and demand judgment for costs."

On the calling of the cause for trial, and after reading the pleadings, the defendants moved his Honor to dismiss the action by way of demurrer *ore tenus* for that the claim of dower of plaintiff, if any she had, should have been made by a special proceeding, returnable before the clerk, and not at Term, and for that the complaint did not state facts sufficient in law to constitute a cause of action, and on consideration of said motion, after debate by counsel, the Court overruled said motion, and ordered the trial to be had, and to this ruling of the Court the defendants excepted.

Thereupon a jury was impanelled and issues submitted to them, which, together with the responses thereto, are as follows:

1. Was Levi Efland in possession of the two tracts of land described in the complaint at the time of his death?

Answer—Yes.

2. Was the 42 acre tract of land bought for Levi Efland by George W. Efland on agreement between them, and paid for by said Levi Efland?

Answer—Yes.

3. Was the deed made to George for the benefit of said Levi?

Answer—Yes.

4. Was the title so directed to be made to George to cover and protect the land from Levi's creditors?

Answer—Yes.

5. Was the tract of 150 acres bid off at the sheriff's sale by George Efland for his father Levi by agreement between them?

Answer—Yes.

6. Was the said tract of 150 acres paid for by Levi Efland?

Answer—Yes.

7. Was the deed taken in the name of Ellen Efland for the benefit of Levi Efland?

Answer—Yes.

8. Was the title so directed to be made to Ellen to cover and protect the land from Levi's creditors?

Answer—Yes.

Besides these issues and responses, the defendants proposed that another issue should be submitted, as to whether the alleged agreements between George W. Efland and Levi Efland, that George should buy the two tracts of land for the benefit of Levi Efland, was in writing or parol, and in answer to this proposal, the plaintiff admitted in open Court that it was by parol.

Whereupon, the presiding Judge made entry of said admission, and held it therefore unnecessary to put that issue to the jury.

Upon the rendition of the verdict, the plaintiff moved the Court for judgment for dower, and for writ to lay off the

same, which motion the defendants resisted, and at the same time moved for judgment in their behalf:

1. For the want of jurisdiction in the Court, and the lack of facts sufficient to constitute a cause of action.

2. For that the plaintiff admitting the agreements between Levi Efland and George W. Efland to buy the two tracts of land for Levi Efland's benefit, to have been in parol, there was no enforcible trust for Levi under the statute of frauds, and there being none for him, there could be none for the plaintiff, his widow.

3. For that the jury having found that the deeds were directed to be made to George W., and to Ellen, to cover and protect the lands from Levi's creditors, then, although Levi paid the purchase money, no Court would construe the holders of the legal title into trustees for Levi Efland, they being dishonest trusts, and would not so construe for the benefit of his widow, claiming derivatively through him.

4. For that in any view of the case, Levi Efland could not be construed to have anything of higher dignity than a mere *right* to have a trust declared for him, and of *rights* a widow cannot be endowed, but only of *seizins and equitable estates.*

His Honor overruled the motion of the defendants, and adjudged the plaintiff to be entitled to dower, and defendants excepted and appealed to the Supreme Court.

Mr. L. M. Scott, for the plaintiff.
No counsel for the defendants.

DAVIS, J., (after stating the facts). The first exception is to the jurisdiction of the Court. Although the statute (*The Code*, §2111,) provides that a widow may apply for assignment of dower by petition in the Superior Court, as in other cases of Special Proceedings, and when the application is so made it must be returnable before the clerk, and not to the Superior Court in Term, yet that was not intended to deprive

the Superior Court of the equitable jurisdiction, is well established. *Campbell* v. *Murphy*, 2 Jones Eq., 359; *Jones* v. *Gerock*, 6 Jones Eq., 190. But, as was said by ASHE, J., in *Pollard* v. *Slaughter*, 92 N. C., 81; "The application to the equitable jurisdiction of the Court, should, as a general rule, contain some equitable element."

That equitable element exists in this case, and involves questions both of law and fact, which could not be adjudicated before the clerk, and which, under the old practice, would have been cognizable in a Court of Equity, and is properly a "civil action" within the definition of PEARSON, C. J., in *Tate* v. *Powe*, 64 N. C., 684. There was no error in overruling the exception.

The three other exceptions may be considered together. It seems that the defendants' counsel and the Court, regarded the relation of Levi Efland to both tracts as the same, and the rights of the widow in relation to both as the same, and the defendants insist that the jury having found the deeds were directed to be made to the son and daughter respectively, to cover and protect the land from the father's creditors, that, although the purchase money was paid by the father, the Court would not construe the holders of the legal title into trustees of Levi Efland, they being dishonest trusts; and moreover, the agreement that the purchase was for Levi's benefit, being by *parol*, there was no enforcible trust in favor of Levi under the statute of frauds, and the widow claiming derivatively through him, could be in no better position than he was.

It appears that Levi Efland never was seized or possessed of the tract of forty-two acres, though purchased by George for him and paid for with his money, as found by the jury, nor was he at any time seized in fee of such an equitable estate therein as could be enforced in a Court of Equity. *Rhem* v. *Tull*, 13 Ired., 62. As to this tract, there was no such seizin or equitable estate in Levi Efland during cover-

ture, as would entitle his widow to dower therein. The possession at the time of his death does not constitute the seizin necessary to support the widow's claim to dower. *Barnes* v. *Raper*, 90 N. C., 189, and the cases there cited.

The tract of 150 acres conveyed to the defendant Ellen, stands upon a very different footing. The husband was not only in possession of this tract at the time of his death, but he was seized and possessed thereof during the coverture. The record does not show when the title was acquired or when the marriage took place, but if subsequent to the act restoring to married women the common law right to dower, it is clear that the plaintiff's right to dower in this land would not have been destroyed, even if the purchase by George and the deed to Ellen had been in good faith. As to how it might be, if acquired before the act, we express no opinion.

But the fraudulent conduct of the parties in this transaction, though "with no view or aim in any way to defraud the plaintiff," is sought now to be invested with the force and effect to deprive her of her right to dower in the land of which her husband was seized during coverture, and which he possessed at the time of his death. This cannot be allowed.

"As the money was the father's and not the daughter's, there was in truth no price and no sale as between father and daughter." *Dobson* v. *Erwin*, 1 D. & B., 573.

The plaintiff is entitled to dower in the tract of 150 acres, but not in the tract of 42 acres.

Let this opinion be certified, to the end that the judgment of the Superior Court may be modified in conformity therewith.

Error. Modified.

W. W. GRAVES et al. v. C. R. TRUEBLOOD et als.

Evidence—Assignment of Error—Mistake—Powers—Curtesy—Parties.

1. Where evidence offered by the plaintiff bearing only on one issue, is admitted after objection by the defendant, it cannot be assigned as error, if the verdict on that issue is in favor of the defendants, although the judgment on the entire verdict is against him.
2. It is not erroneous for the trial Judge to reject evidence when there is no issue to which it is applicable.
3. In an action to reform a deed, the evidence of the party asking the reformation, as to the object of purchasing the land, the directions given to the draughtsman, &c., is not sufficient to warrant a verdict upon which the Court would decree a reformation of the deed.
4. An estate settled on a *feme covert* for life, with a power of appointment at her death in fee, does not give her such an estate as will entitle the husband to curtesy if she fails to appoint.
5. Where an estate is settled on one for life, with a power to appoint in fee, by writing to take effect after her death, and in case of a failure to appoint, then to the heirs of the donee for life, the word heirs does not come within the provisions of the Rev. Code, ch. 43, §5, so as to be interpreted children.
6. Where land is given to a trustee to hold on various trusts, and after the death of the trustee an action is brought to construe the trusts and enforce the provisions of the deed, the Court cannot decree a conveyance of the legal estate unless all of the heirs of the trustee are parties.
7. One who has the right of possession of an equitable estate in land, may maintain an action for the possession.

(*Patrick* v. *Morehead*, 85 N. C., 62; cited and approved).

CIVIL ACTION, tried before *Gudger*, *Judge*, at Spring Term, 1886, of PASQUOTANK Superior Court.

On December 26th, 1859, Meta Palmer, for the recited consideration of one thousand six hundred and fifty dollars, conveyed by deed two lots of land in the town of Elizabeth City, which are described by boundaries therein, and also in

the complaint, to John S. Burgess, in fee, to be held upon the following trusts:

I. "For the sole and separate benefit of Barsheba Trueblood, now the wife of Cornelius Trueblood, for and during the time or continuance of the coverture, or the joint lives of said Barsheba and her husband.

II. "If the said Barsheba shall survive her said husband, then on demand being made of him, the said Burgess his heirs or assigns, shall execute a proper deed of conveyance of all their title to the lots of land hereby conveyed, to the said Barsheba and her heirs, to be held by her in fee simple.

III. "If she shall die before her husband, and in writing to be attested by two witnesses, appoint and direct in what manner and to whom, the lots, one or both, shall be conveyed, they shall be so conveyed by the trustee.

IV. "If she shall die not having made such appointment, and in the manner pointed out, upon a like demand, the trustee, his heirs or assigns, shall convey the lots to the proper heirs at law of the said Barsheba Trueblood," with provisions as to rents and expenses not necessary to set out.

The equitable donee for life died without having exercised the conferred power of appointment, and her husband continuing in possession and claiming the right to do so, the *feme* plaintiff, a daughter of Mary Laboyteaux, a sister of the deceased, and her husband, bring this action against the said donee, to recover possession. The defendant Abel Gallop, subsequently introduced into the action, is a brother of the said Barsheba, and these two are her only heirs at law.

There was born of the bodies of said Cornelius and Barsheba, during their coverture, capable of inheriting, a child who died during his mother's life.

The controversy between the two heirs at law, one in interest, while on opposing sides in the cause, and the contesting defendant Cornelius, was mainly as to the source from

which the money used in paying for the lots was derived, the former insisting that it came from their mother's estate; the latter that it was the earnings of himself and wife, and that the instructions given to the draftsman of the deed, were to secure the remainder, after the life estate, to him, which from inadvertence had not been done. Besides, as we understand, he construes the deed as vesting an estate in Barsheba, and thus he has an estate, as tenant by the curtesy, which justifies his occupancy.

Upon issues framed for the jury, they find that the purchase money did not come from Mary Laboyteaux, but was accumulated by defendant and his wife, before and during their marriage; that they expended $1,950 in the support of Mary Laboyteaux's children; that live issue was born to the defendant and wife, and that the *feme* plaintiff at the time of her marriage was eighteen years of age.

In the case sent up, there are but two exceptions taken—one to the reception, the other to the rejection of evidence offered on the trial by the defendants, who appeal.

Mr. John E. Bledsoe, for the plaintiffs.
Mr. E. F. Aydlett, for the defendants.

SMITH, C. J., (after stating the facts):

I. The plaintiffs, after objection, were allowed to prove declarations of said Barsheba in reference to her having money and other property of the *feme* plaintiff in her hands.

No prejudicial result came to the defendant from the admission of the evidence, since with it, the verdict upon the issue to which it was applicable, is against the plaintiff.

II. The Court refused to let the jury hear the testimony of the defendant Cornelius as to what passed between him and his wife about the payment of the purchase money, and whence it was derived—their object in making the pur-

chase—and the directions given the attorney in drawing the deed.

The proof offered on the first point was sufficient, without this in corroboration rejected, to satisfy the jury that the fund so used did belong to them, and such is their finding upon that issue.

No detriment has thereupon come to the appellant and its reception would have been of no advantage.

The proof, so far as it tended to show a mistake in the form of the deed in disposing of the remainder, was incompetent, if for no other reason, because there was no issue to which it was pertinent, and if pertinent, it would have been insufficient to warrant a verdict upon which the Court would feel authorized to act in ordering a reformation of the instrument.

The construction of the concluding words in the declaration of trusts, was then presented to the Court in the opposing demands of the parties for judgment.

The case of *Patrick* v. *Morehead*, 85 N. C., 62, establishes the doctrine which gives but an estate for life to the said Barsheba, not enlarged by the power to designate to whom the inheritance shall go at her decease. The failure to exercise the power, does not enlarge the estate given, but brings into operation the clause that in such contingency, limits the remainder "*to the proper heirs at law of the said Barsheba Trueblood.*"

These are to be ascertained by inquiring who would be her heirs, to whom, if she had been given an estate of inheritance, it would descend at her death. Those answering the description at that period would be the persons designated in the deed. It is not a present limitation to the heirs of a living person, so as to come within the words of the act of 1856—Rev. Code, ch. 43, §5—and to mean children, but a contingent limitation to such persons as sustain the relation to the deceased at the time of her death. These take not

under her, but under the deed, as remainder-men. There was, therefore, no estate to be prolonged in the defendant as tenant by the curtesy, and the contingent interest in the remainder, at once upon her death without exercising the power of appointment, became vested and certain.

It does not appear that all the heirs at law of the trustee are before the Court, three only of whom have been served with process, and these do not answer. Nor does it appear that publication has been made for such as are non-residents. The absence of those not legally brought into the cause, and whose presence is necessary to give jurisdiction, prevents any decree for a conveyance of the legal title.

But as the right of possession of an equitable estate in the *feme* plaintiff and the defendant Gallop, will support an action for possession, and this, without damages, is the effect of the judgment rendered, it must be sustained.

There is no error entitling the plaintiff to a new trial, nor can he demand judgment upon the verdict. The judgment is affirmed.

No error. Affirmed.

GEORGE MEDLOCK v. ROBERT POWELL.

Gift of Personal Property—Delivery.

1. In order to perfect a gift of personal property, there must be an actual delivery, if the nature of the property will admit of an actual delivery, and if not, then some act must be done equivalent to actual delivery, and which will have the effect to pass the title to it.

2. So where a father said to his son that he might have a certain colt, if he would raise it, and there was other evidence tending to show that the father intended that the son should have the colt, but there was no evidence to show a delivery; *It was held*, that the property did not pass, and the colt belonged to the father.

(*Picot* v. *Saunderson*, 1 Dev., 309; *Adams* v. *Hayes*, 2 Ired., 361; *Brewer* v. *Harvey*, 72 N. C., 176; cited and approved).

CIVIL ACTION, tried before *Montgomery, Judge*, and a jury, at Fall Term, 1886, of BURKE Superior Court.

The plaintiff brought this action to recover possession of a mule, which he alleges is his property. On the trial, the evidence in substance was, that while the plaintiff was under age, living and working with and for his father on his farm, the latter said to him on one occasion, that "he might have the colt if he would raise it." After that, the plaintiff claimed the colt, but it remained with the father's horses, and was fed with them. The father, with the consent of the plaintiff, exchanged the colt for the mule in controversy, which was put upon the farm, the plaintiff claiming and using it when he saw fit, but it was used by the father for his purposes on the farm, and when the father left home in 1881, not to return, on account of some domestic trouble, he took the mule with him and kept it two or three years, and until his death. The plaintiff never took the colt or the mule from the farm of the father, though he left himself. The father said, perhaps more than once, that the mule was the plaintiff's. On more than one occasion, persons wanted to hire the mule, and the father referred them to the plaintiff, saying, "if he will let you have it, all right," and the plaintiff received the hire. There was no evidence that the plaintiff ever made demand of the father for the mule.

The Court, upon the evidence, intimated the opinion that the plaintiff could not recover. Thereupon, the plaintiff submitted to a judgment of *nonsuit*, and appealed to this Court.

Mr. Isaac T. Avery filed a brief for the plaintiff.
Mr. S. J. Ervin, for the defendant.

MERRIMON, J., (after stating the facts). A gift of personal property is voluntary and without consideration, and it is essential that the property shall be delivered to the person to whom it is granted, or to some person for him. The delivery must be actual, so far as the subject of the gift in its nature is capable of delivery. If actual delivery cannot be made, then some act equivalent to it must be done in connection with or about the property given, that has the legal effect to pass the title to it. The donor must part with his dominion over it, in a way effectual to transfer it to the person to whom the gift is made. Hence, it is not sufficient, to make a valid gift, that one intends to give a particular piece of property, as a horse, to his son, or another person, that he declared his purpose to do so; that he said the horse belonged to his son; that he so said to divers persons; that members of the family understood that he had so given the horse; and that he had said that the son might do as he wished with it, and the like expressions. There can be no gift without delivery. *Picot* v. *Saunderson*, 1 Dev., 309; *Adams* v. *Hayes*, 2 Ire., 361; 2 Kent Com., 439; Williams on Personal Property, 33; *Brewer* v. *Harvey*, 77 N. C., 176.

The evidence in this case tended to prove no more than that the father intended for some time to give the colt mentioned in the evidence to the plaintiff, his son. The latter, no doubt, thought he had done so; the family may have so believed, but this, as we have seen, was not sufficient. There was no evidence that the purpose to make the gift was accompanied with actual delivery. There is nothing going to show that the colt being present, the father, by some act intended for that purpose, parted with the actual possession of and dominion over it, and delivered and transferred the same to the plaintiff. Nor were facts in evidence from which

this might be reasonably inferred. When the father said, "The colt is George's," he obviously meant no more than that he had simply said so. He did not mean to say, he had delivered the colt to the plaintiff, and parted with all his right to it. And so of the mule; the father did not understand that he had parted with the colt first, and afterwards with the mule substituted for it. He treated them as his own, while encouraging his son to believe that he had a right to them, that should at some time be made perfect, which, so far as appears, never was done. Indeed, the father seems to have changed his purpose to perfect the gift, for he took the mule for himself, and kept it for several years, until he died, the plaintiff making no demand upon his father for it. But if the father had believed that he passed the title by what he did, this would not be sufficient without delivery.

We think the Court properly held that there was no evidence of delivery to go to the jury.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

ARTEMUS McNAIR et als. v. POPE & McLEOD.

Receiver—Mortgage.

1. Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action.

2. *Quære*, whether a deed executed by the executor of a deceased mortgagee, who undertook to sell the land in pursuance of the mortgage to his testator, would establish such apparent right; but when the

purchaser at such sale also sets up a release from the mortgagor, he makes out an apparent title, and is entitled to a receiver, although the release is attacked for fraud.

(*Kerchner* v. *Fairley*, 80 N. C., 24; *Nesbit* v. *Turrentine*, 83 N. C., 535; *Oldham* v. *The Bank*, 84 N. C., 304; *Horton* v. *White*, Ibid. 297; *Lumber Co.* v. *Wallace*, 93 N. C., 22; cited and approved).

This is an appeal from an ORDER APPOINTING A RECEIVER, made by *Gilmer, Judge,* at the August Term, 1886, of ROBESON Superior Court.

The plaintiffs are the heirs at law of Duncan McNair, deceased, who, in January, 1869, had executed a mortgage to one John McCallum, a copy of which is filed with the complaint. John McCallum died in 1871, leaving a will, with Alex. McRae and John L. McRae as executors, who duly qualified as such, and on March 9th, 1875, sold the land mentioned in the mortgage, at public auction, and executed a deed purporting to convey the land to the defendants. The plaintiffs allege that there was no authority or power in the executors of McCallum to sell under the mortgage; they further allege that the land was bid off by the defendants with an express understanding and agreement with Duncan McNair, their ancestor, that they would buy the land for him, take title to themselves, and hold it till the debt secured by the mortgage should be paid, when they would convey to him. They further allege, that on the 18th day of April, 1876, Duncan McNair executed to the defendants a paper writing, purporting to be a deed for said land, but that at the time it was executed, the relation of mortgagor and mortgagee existed between the said Duncan and the defendants, and they insist that the conveyance was without adequate consideration, and was fraudulent and void, and, in addition thereto, that at the time of the making of said last named conveyance, it was understood and agreed that the defendants would hold the said land only as a security for the debts therein named, and that the said Duncan had

paid off the said debts, and a large part, if not all, of the $3,092.18, mentioned as the consideration of the deed; that the defendants had received a large amount as rents, which should be credited on the debts and amounts named in the conveyance; that the said Duncan was in the possession of the land up to the time of his death, claiming it as his own, and that the plaintiffs have been in possession thereof since the death of said Duncan, their father, claiming and cultivating the land as their own.

They ask that the defendants may be declared trustees for the plaintiffs, and required to convey to them the legal title, for an account of the rents received, and for an account to ascertain the amount that was due to the defendants from Duncan McNair, and that the plaintiffs be allowed a reasonable time to pay the same, and in default thereof, that the land be sold, &c.

The defendants, answering the complaint, deny specifically and in detail, the allegations upon which the plaintiffs base their claim to have the defendants declared trustees, &c., and assert that the sale made by the executors of John McCallum, was in pursuance of the mortgage executed to their testator by Duncan McNair, and if there was no authority in the executors to sell, that the said Duncan assented to and concurred in said sale, and permitted the defendants to purchase the land for value, without objection on his part, and at all times thereafter acquiesced in the same, and that the plaintiffs, who claim through him, ought not to be permitted to dispute their title. They also claim under the deed executed to them by Duncan McNair on the 18th day of April, 1876, and deny that the relation of mortgagor and mortgagee existed between them and the said Duncan, and say that the said deed was made in entire good faith, for fair value, and was intended to convey to them in fee simple any interest that the said Duncan had in said land. They admit that the said Duncan continued to reside

on the land up to the time of his death, but that at no time after the purchase by the defendant, did he dispute their title, or make any claim thereto, but at all times thereafter, and until August 5th, 1880, occupied the same as tenant of the defendants under lease, and that on that day, with the knowledge and concurrence of the said Duncan, they leased the land to the plaintiff Artemus McNair, the said Duncan continuing to remain on said land with the said Artemus, and that all the plaintiffs had full knowledge of this.

There are other matters set out in the answer in respect to the defendants' claim of title to the land, not necessary to be stated in considering the question before this Court. The defendants say in their answer, "that the plaintiffs are totally insolvent, claiming nothing of any consequence but the land in controversy in this action, and that they, or some of them, are now in the receipt of rents and profits of said lands, converting them to their own use, and that the said rents and profits are in danger of being lost."

The copies of the mortgage deed from Duncan McNair to John McCallum, the deed from the executors of McCallum to the defendants, and the deed from Duncan McNair to the defendants, are filed with the pleadings as exhibits. The complaint and answer are verified.

His Honor, after reciting that the defendants had established an apparent right to the property described in the complaint and answer, and that it appeared to the Court that the plaintiffs were in the possession of the land described in the complaint and answer, and that the plaintiffs were insolvent, and the rents and profits of said land were in danger of being lost to the defendants, should they establish their title to said lands, made an order appointing a receiver, and from this order the plaintiffs appealed.

Mr. T. A. McNeill, for the plaintiffs.

Messrs. N. A. McNeill and *Wm. Black*, for the defendants.

DAVIS, J., (after stating the facts). *The Code*, §379. provides, that a receiver may be appointed: "before judgment, on the application of either party, when he establishes an apparent right to property, which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired."

The apparent right of the defendants to the property in this action, if it depended only upon the deed from the executors of John McCallum, would perhaps not warrant the order appointing a receiver, but the deed from Duncan McNair, if *bona fide*, as is alleged by the defendants, would cure any defect in the title derived from the executor of John McCallum, and as the equities upon which the plaintiffs rely, are denied by the defendants, who, it is conceded, have the legal title, and it appears that the plaintiffs are in possession of the property, and that by reason of their insolvency, the rents and profits will probably be lost to the defendants if they shall recover the land, the order appointing a receiver was properly granted. *Kerchner* v. *Fairley*, 80 N. C., 24, and cases there cited; *Nesbit* v. *Turrentine*, 83 N. C., 535, and cases cited; *Oldham* v. *Bank*, 84 N. C., 304; *Horton* v. *White*, 84 N. C., 297; *Lumber Co.* v. *Wallace*, 93 N. C., 22.

There is no error. Let this be certified.

No error. Affirmed.

F. H. PENDLETON, Ex't'r, and in his individual capacity, v. J. H. DALTON.

Variance.

1. Where a variance is not merely formal, but lies at the very root of the cause of action, it is fatal to the plaintiff's right to recover.
2. So where a suit was brought on a contract alleged to have been made with a decedent, and for the benefit of his estate, but the evidence showed that he was not a party to the contract in its origin, nor did he ever acquire an interest in it by assignment, the variance was fatal, and the plaintiff was properly nonsuited.

(*Pendleton* v. *Dalton*, 92 N. C., 185; cited).

CIVIL ACTION, tried before *Boykin, Judge* at Fall Term, 1886, of IREDELL Superior Court.

The Court intimated that upon the evidence the plaintiff could not recover, whereupon he took a nonsuit and appealed.

The facts appear in the opinion.

Messrs. R. F. Armfield and *D. M. Furches*, for the plaintiff.

Messrs. George V. Strong, R. T. Gray and *E. R. Stamps* filed a brief, for the defendant.

SMITH, C. J. The controversies to which the execution of the two written instruments mentioned in the record have given rise—one made on October 18th, 1862, the other on February 13th, 1863—have been, at various times, and in different forms, before the Court; and their aims and results, as well as the grounds upon which they were prosecuted, are fully stated in the opinion in the last appeal to this Court; *Pendleton* v. *Dalton*, 92 N. C., 185. It is unnecessary to repeat the facts in detail. Suits in equity were instituted in the name of W. J. Pendleton against the defendant, to enforce

performance of the second, as a superseding contract; then in the name of F. H. Pendleton to enforce the former, and in both without success

Again, a suit in equity was instituted by the said W. J. Pendleton, in the United States Circuit Court, to compel execution of the October contract, which by his death abated.

Another action was prosecuted in the name of the devisees of the said W. J. Pendleton, of whom the said Frederick H. was one, in the Superior Court of Iredell county, to obtain a conveyance of the land upon an allegation that the contracts were made in the interest and for the benefit of the deceased, and this action was dismissed for failure to justify the prosecution bond, under a rule in the cause.

In November, 1879, suit was brought by the said F. H. Pendleton, as executor of his deceased father, against the defendant, in which is demanded judgment for the sum ($11,000) paid, as shown in the receipt of February. Upon the trial, the Superior Court intimated an opinion against the plaintiff's ability to maintain the action, in which, upon appeal, this Court concurred.

The present action, begun on June 6th, 1885, is in the name of F. H. Pendleton, as executor, and in his own name, for the use of the estate of said W. J. Pendleton, against the defendant in person, and in his capacity of executor of Placebo Houston, and has for its object, as did that last mentioned, the recovery of the money paid for the land, as damages. It differs from the last proceeding, in that the action is for a breach of the contract of October, which is under seal, and to which there is no statutory bar, while the other was upon the contract of February following, to which, not being under seal, the bar of the statute did apply, and so it was ruled in disposing of that appeal.

The claim now asserted is solely in behalf of the estate of the deceased, upon an equity derived out of an alleged, but undisclosed agency, exercised by the contracting obligor in the

act of entering into the agreement, and must be so considered.

The defendant denies the existence of any such agency, known to him, and asserts the contract to have been, and so intended, as upon its face appears, between the parties who executed it, and in their individual capacities. This responsive statement is sustained by his deposition taken and read in the cause, and wherein he further testifies, that he caused to be prepared and signed, a deed conveying the land according to the covenant stipulations, and tendered the same after receiving the $11,000 payment, to said F. H. Pendleton, and it was refused because it did not embrace the larger area specified in the receipt of February. It is further testified, that after the refusal and the termination of the pending suit, he tendered, or rather offered to return the funds and securities to him, but they had then become, as ever since they have been, utterly worthless.

On the trial before the jury, the plaintiff introduced evidence tending to show that the defendant had collected and applied to his own use the interest accrued on the several Confederate and State securities passed to him, and had transferred the State bonds into his own name; and that he had, in July, 1880, conveyed the same land to one Kennedy.

There was no evidence of mistake in putting the covenant into its existing form, so as to warrant its modification, or that any one but the plaintiff, professedly acting for himself, was known in the transaction of purchase. Moreover, in the bill filed in February, 1868, an exhibit offered as evidence to enforce the contract of October, 1862, it is represented as made with the plaintiff individually, and as such he paid over the purchase money, and in December took possession with his slaves and stock, and worked the plantation. In answer to this, the defendant states, that in the previous suit to enforce the second contract, as contained in the receipt, in the name of the testator, the plaintiff testified to his agency

in the purchase, and its repudiation by him when reported, because it did not embrace the entire plantation. It is thus apparent, that while the present suit is in equity for the benefit of the testator's estate, it is upon a contract in which he is not a party in its origin or by a subsequent transfer, and consequently cannot prevail. The defendant made no such contract as alleged, with the plaintiff testator, on which he can recover. The variance in the case, made in the complaint and in the pleadings, is not immaterial, but the defect lies at the very root of the action.

Without adverting to other difficulties in the plaintiff's way, we discover no error in the opinion of the Court upon the intimation of which he suffered a nonsuit, and therefore it must stand as the judgment of the Court.

No error. Affirmed.

JOHN W. WILEY v. GEO. W. LOGAN.

Reference—Practice.

1. Where in the trial of an action before a referee, the defendant puts his defence on one point which is sustained by the referee, he cannot ask to have other defences tried, not raised before the referee, when the conclusions of the referee have been reversed.
2. So, in an action against the defendant for failing to account for notes put into his hands for collection, the referee ruled that the action could not be maintained for want of a demand, which ruling was sustained by the Superior Court, but sufficient facts were found by the referee to warrant a judgment, the question of demand being removed; *It was held*, that upon reversing the judgment in the Supreme Court, the defendant was not entitled to have the case retried, on the issue as to whether he had ever received the claims or not.

After the judgment in this case, (see 95 N. C., 358,) the referee made his report, and the defendant filed exceptions thereto, which are set out in the opinion.

Mr. Sam'l F. Mordecai, for the plaintiff.
Mr. W. P. Bynum, for the defendant.

SMITH, C. J. Upon the coming in of the report in response to the order of reference, the defendant files exceptions thereto, as follows:

I. For that no allowance of commissions has been made upon the sum with which he is charged on the claim called the Weaver debt.

II. For that through inadvertence, the defendant is charged with that claim, when it is not demanded nor specified in any manner in the complaint, nor identified as the same indebtedness as that mentioned as due by one Sylvester Mitchell.

III. For that in overruling the conclusion of law of the referee, that for want of a previous demand the defendant had not become liable, no opportunity is allowed to show other defence to the claim.

I. No objection is made to the first exception, and the defendant will be allowed a deduction from the amount found against him of five per centum thereon.

II. There is manifest confusion in the proceedings in which these notes are designated, for while the sums called for in each are the same, they are in general terms referred to in the complaint as "notes on one S. Mitchell, placed in defendant's hands for collection," and so they are designated in one of the plaintiff's exceptions to their rejection by the referee for want of a demand. Yet among the findings of fact, the referee, specifying the year in which the notes were placed with the defendant for collection, and the several amounts of each, describes them as the three notes on Sylvester Weaver, in-

stead of Sylvester Mitchell, not indicating otherwise that the same person is meant.

Again, when the plaintiff was examined as a witness upon the inquiry before the referee, and was asked about the solvency of "the claim on Sylvester Mitchell," at the time when it was placed in the defendant's hands, the question is objected to because the claim "was not mentioned specially in the complaint," and no other reason assigned for its exclusion.

When Sylvester Mitchell was under examination by plaintiff, he stated, though objection was made, that his financial standing in 1858 and 1859 was good; upon his cross-examination by defendant, that he did not know of any such outstanding indebtedness of his own, nor does he recollect that the defendant held such claims, nor whether he paid anything to him; and on his re-direct examination, he does not deny his liability on the notes set out in the defendant's receipt.

The defendant, a witness in his own behalf, was asked on cross-examination about the debts of Mitchell, and, after a similar objection that they were not mentioned in the complaint, which was overruled, testified to his want of recollection of such notes or their amount, adding, "I did a great deal of business for Wiley, and at some time may have had notes against Sylvester Mitchell."

Recalled, the plaintiff testified, after the same form of objection, that he did, he thinks in 1858, put three notes in defendant's hands, to collect against Sylvester Mitchell, in the respective sums of $85, $100 and $40, for none of which he had accounted.

These references to the testimony are not made to it for any other purpose than to show that the indebtedness of Mitchell, alleged in the complaint in a general way, authorized the inquiry into the defendant's responsibility in regard to them which was made, and to show that the responsibility

was resisted upon the ground, untenable as it was, that they are not specified in the complaint, and upon none other. They were consequently within the sphere of the order of reference, and were properly taken cognizance of, passed on, and the result reported by the referee, though miscalled by him in his report, as the debts of Weaver, instead of Mitchell.

The referee finds all the elements to exist on which the agent's responsibility depends: the delivery; the solvency of the debtor; and that by proper exertion the debts could have been collected, while it does not appear that they were produced, or the failure to produce them in any manner explained; and he exonerates the defendant in this action because no demand therefor was made.

Now, as all the facts which the parties chose to bring before the referee, do warrant an inference of the defendant's liability, of which the absence of a previous demand is held by the referee to relieve him, and as, in our opinion, the reason given was wholly insufficient, no alternative was left but to declare the defendant's legal accountability, and to sustain the plaintiff's exception thereto. The referee's mistake in the name of the debtor, and such the record seems to show when the subject has been fully inquired into, ought not to be allowed to defeat the plaintiff's right in this regard.

If any defence to the claim existed, it should have been brought forward before the referee, and the case not hazarded upon the technical want of a demand.

The report, corrected as to the commissions, must be confirmed, and judgment entered accordingly.

No error. Affirmed.

JOHN L. McDOWELL v. THE MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY et als.

Qualified Voters—Election—Registration.

1. The ruling heretofore made in *Southerland* v. *Goldsboro*, ante, 49, and *Duke* v. *Brown*, ante, 127, in regard to the meaning of the term "qualified voters," as used in Art. 7, §7, of the Constitution, affirmed.

2. Before an election is held, opportunity must be given to all persons entitled to become qualified voters to register, and if this opportunity is denied, either purposely or by accident, it may vitiate the election, and will certainly do so, if such denial should materially affect the result.

3. When the County Commissioners ascertain and declare the result of an election, their action and declaration cannot be attacked collaterally, but it may be by a direct proceeding for that purpose.

4. Where it is sought to directly attack and have declared void the action of the Commissioners in declaring the result of an election, the action need not be brought until some action is proposed to be taken under the alleged election.

5. So, where an election was held in 1883, for the purpose of obtaining authority to issue bonds in aid of a railroad corporation, which the Commissioners declared to have been ratified by a majority of the qualified voters, but it was not attempted to issue the bonds until 1886; *It was held*, that an action brought to attack the finding of the Commissioners when they attempted to issue the bonds, was not barred.

6. In an action brought to have an election to ratify the issue of bonds to a railroad corporation declared void, and to restrain the issuing of the bonds, it was made *prima facie* at least, to appear, that the election was not called in accordance with law; that no notice of the election was given; that no opportunity was given for registration to such persons as had become qualified since the last election; that as a matter of fact, a majority of the qualified voters did not vote for the measure, and that there were various other grave irregularities: *It was held*, that an injunction until the hearing should be granted, to restrain all action under and in pursuance of the election.

7. Where in such case, it was made to appear, that since the appeal was taken, the bonds had been delivered: *It was held*, that it was immaterial.

(*Norment* v. *Charlotte*, 85 N. C., 387; *Southerland* v. *Goldsboro*, ante, 49; *Duke* v. *Brown*, ante, 127; *Perry* v. *Whitaker*, 71 N. C., 475; *VanBokkelan* v. *Canaday*, 73 N. C., 198; *Heilig* v. *Stokes*, 63 N. C., 612; *Coates* v. *Wilkes*, 92 N. C., 376; *Harrison* v. *Bray*, 92 N. C., 488; *Turner* v. *Cuthrell*, 94 N. C., 239; *Blackwell* v. *McElwee*, 94 N. C., 425; cited and approved. *Smallwood* v. *Newberne*, 90 N. C., 36; *Simpson* v. *The Commissioners*, 84 N. C., 158; *Cain* v. *The Commissioners*, 86 N. C., 8; cited and distinguished. *Reiger* v. *The Commissioners*, 70 N. C., 319; commented on).

MOTION to continue an injunction to the hearing, in an action pending in the Superior Court of RUTHERFORD county, heard before *Avery, Judge*, at Chambers, in Newton, on June 1, 1886.

The defendant, the "Rutherford Railway Construction Company," is a corporation organized under and in pursuance of the statute, (Acts 1883, chap. 141). The sections of that statute necessary to an understanding of the opinion of the Court, provide as follows:

"SEC. 2. That the capital stock of said company may be created by subscription on the part of individuals, municipal or other corporations, in shares of fifty dollars each, which may be in lands, timber, work or money, as may be stipulated.

"SEC. 10. That upon the written request of one fifth of the qualified voters of the county of Rutherford, the Board of Commissioners of said county shall cause an election to be held at the several precincts of said county, for the purpose of submitting to the qualified voters thereof, the question whether the subscription of fifty thousand dollars voted by said county, on the seventh day of August, one thousand eight hundred and eighty-one, to the Rutherford and Spartanburg Railroad, may or may not be transferred and subscribed to the capital stock of 'The Rutherford Railway Con-

struction Company,' and also at the same time, the question of subscribing an additional fifty thousand dollars to the capital stock of said 'Rutherford Railway Construction Company.'

"SEC. 11. That if a majority of the qualified voters of Rutherford county, at said election, shall vote for 'transfer,' then the railroad agents for said county, appointed by the commissioners to control the subscription voted to the Rutherford and Spartanburg Railroad, the seventh day of August, one thousand eight hundred and eighty-one, shall be authorized to subscribe said fifty thousand dollars to the capital stock of the 'Rutherford Railway Construction Company,' and shall pay said subscription to said company in such manner as said agents shall believe to be best to promote and advance the construction and completion of said railroad.

"SEC. 12. And if a majority of the qualified voters of said county, at said election as aforesaid, shall vote for 'subscription,' then the said agents aforesaid, shall be authorized to subscribe the additional fifty thousand dollars thus voted for to the capital stock of said 'Rutherford Railway Construction Company,' in like manner as provided in section eleven of this act."

Section thirteen of this statute provides, that the county commissioners may issue bonds of the county named, in the way prescribed, to pay for the capital stock so to be, and when subscribed; and section fourteen provides, that the proper county authorities shall levy a county tax, adequate to pay the interest that may accrue upon the bonds so to be issued, and the principal thereof when the same shall become due.

The plaintiff alleges in his complaint, in substance, that the defendants, the county commissioners of the county of Rutherford, professed, in pursuance of the above statutory provisions, to cause an election to be held in that county, as therein prescribed and allowed, on the 2d day of August,

1883, to take the sense of the qualified voters of that county, upon the propositions to subscribe $100,000 to the capital stock of the "Rutherford Railway Construction Company," in the way and manner prescribed, and they declared the alleged result of such election as follows:

"It having been shown to us, that the election held on 2d day of August, 1883, upon the subject of a railroad subscription, was carried for 'transfer,' and also for 'subscription,' by a majority of the qualified voters of said county, in accordance with the 11th section of said act, incorporating the Rutherford Railway Construction Company, ratified by the General Assembly of North Carolina, on the 6th of February, 1883; It is therefore ordered that said election be registered."

The plaintiff further alleges and demands judgment as follows:

8. But complainant alleges and shows, that prior to said election, the books of registration of qualified voters were not opened at each or any of the election precincts in said county, as the law required, nor were the qualified voters of said county, who had not theretofore registered, and those who had become qualified voters since the last registration, allowed an opportunity to register themselves as by the law they were entitled to; nor at said election were any persons allowed to vote whose names did not appear upon the old registration books, had and kept at said election precincts, there having been no registration of voters made or allowed since the election held in November, 1882, for members of the General Assembly, and for other purposes.

9. Complainant alleges and shows, that at the time of said railroad election, there were many citizens and residents of said county who were qualified voters and entitled to registration and to vote at said election, and that they were deprived of their right and privilege to vote, by the neglect and refusal of the proper officers of the county to order the

books of registration to be opened as the law directs in such cases.

Further complaining the plaintiff alleges, from information and belief, that a large majority of those so entitled to register and vote, would have voted against "transfer" and against "subscription" at said election, if they had had an opportunity to do so, and whose votes would have changed the result adversely to "transfer" and "subscription," as declared by said county commissioners.

10. Further complaining the plaintiff alleges and shows, that a majority of the qualified voters of said county, at said election did not vote for "transfer" and "subscription," for that the qualified voters in said county exceed three thousand, as the plaintiff is informed and believes, whereas the number that voted for "transfer" was 1,493, and for "subscription" was 1,225 votes, being a minority of the qualified voters of the county.

11. Complainant further shows that notwithstanding the fact that no books of registration were opened as aforesaid, and the qualified voters of the county allowed to register and vote in the way provided by the law, and notwithstanding the fact that a majority of the qualified voters of the county did not vote for "transfer" and "subscription," yet said board of commissioners, in defiance of these facts and the law, proceeded to declare as aforesaid, that the said election was carried for "transfer" and for "subscription," by a majority of the qualified voters of said county.

12. That in further consummation of their illegal purposes, the said board of commissioners did subscribe to the capital stock of the Rutherford Railway Construction Company, in the name of the county of Rutherford, the said $50,000 theretofore subscribed to the Rutherford and Spartanburg Railroad, and the further sum of $50,000, voted as aforesaid.

Further complaining, the plaintiff alleges and shows, that the defendant Frank Coxe, a citizen and resident of the county of Polk, was appointed by the board of commissioners the agent of the county, and the said bonds so signed by the chairman, to-wit: bonds to the amount of $100,000, were delivered to him to be paid to the said Rutherford Railway Construction Company, as provided in section eleven of said charter.

Further complaining, the plaintiff alleges and shows, that for the payment of the coupons on said bonds now accrued and maturing, and for the purpose of creating a sinking fund for the ultimate payment of said bonds, the board of commissioners of Rutherford county are threatening to and are about to levy and collect a special tax upon the person and taxable property of the plaintiff, situate in said county, and upon the taxable property of all the property holders in said county, and that said tax will be levied unless said levy and collection are restrained by the order and decree of this Court.

Further complaining, the plaintiff alleges and shows, that the transfer of the subscription of fifty thousand dollars, theretofore made to the Rutherford and Spartanburg Railroad Company, was illegal and void, in that the election was not held upon the petition in writing of one fifth of the qualfied voters of the county, but of a less number, as plaintiff is informed and believes, and because said election was held without a registration of voters, as the law requires, whereby a large number of the qualified voters of the county were disfranchised and not allowed to vote, because their names were not upon the old registration books which were used at said election; and because, also, the said "transfer" and "subscription" were not carried by a majority vote of the qualified voters of said county.

Further complaining, the plaintiff shows, that for the reason set forth in the foregoing paragraph of the complaint,

the said election as to the additional subscription of fifty thousand dollars, was illegal and void, and that the said subscription was not carried by a majority vote of the qualified voters of the county.

Further complaining, the plaintiff shows, that by the first section of the act incorporating the Rutherford Railway Construction Company, it is provided: First, that a railroad may be constructed from Rutherfordton by way of Forest City, to the South Carolina line, in the direction of Spartanburg or Gaffney City, in South Carolina; or, secondly: By way of Forest City to Shelby and Whitaker, North Carolina, or to King's Mountain, or to Gastonia, North Carolina, by way of Shelby, as may be most practicable.

That disregarding the provisions of the charter, the said Railroad Construction Company have selected neither of the routes prescribed by the charter, but have located the line of their road by way of Forest City and Shelby, and thence to Black's Station, a point on the Atlanta and Charlotte Air Line Railroad, in South Carolina, and about ten miles distant from Whitaker, and much further from either of the other *termini* prescribed in their charter.

That the said Railway Construction Company, through their contractors, the Massachusetts and Southern Construction Company, are now grading said road, so located between Black's Station and Shelby, although out of the route between Shelby and either of the points or *termini* named in the charter, and that said corporation has altogether refused to adopt either of the *termini* so named in the charter, and are now progressing with the grading, &c., upon the line so situated and adopted as aforesaid.

That when the vote was taken upon the propositions to subscribe as aforesaid, it was upon the provisions of the charter and upon the location as therein provided, and no other; the said subscription, if legal, cannot be applied to the build-

ing of the road upon a route to a point not authorized by the charter.

Further complaining, the plaintiff shows, that there is a contract existing between the Rutherford Railway Construction Company and the Massachusetts and Southern Construction Company, a foreign corporation, but now by virtue of some contract constructing the road of said Rutherford Railway Construction Company between Rutherfordton and Black Station, by which said Massachusetts Company is to receive the bonds aforesaid, and have already received a small part of the same, as plaintiff is informed and believes, under and by virtue of the said contract, the exact particulars of which contract are not known to the plaintiffs.

Further complaining, the plaintiff, from information and belief, alleges, that said county bonds, so authorized to be issued, as aforesaid, were not executed and delivered to the said Frank Coxe in the said county of Rutherford, but on the contrary, the said bonds were taken by the register of deeds of Rutherford county to the city of Philadelphia, and there countersigned by him, and then delivered by him to the said Frank Coxe, in said city of Philadelphia, but whether the county seal was there affixed to the said bonds he is not informed.

Further complaining, the plaintiff shows that one J. W. Morgan is the chairman of the board of commissioners of Rutherford county, and was at the time that said bonds were signed by him as chairman.

Plaintiff further shows, that a summons has been issued against the aforesaid defendants in this case, before the filing of this complaint.

Wherefore plaintiff demands judgment:

1st. That said bonds so issued and delivered to said Frank Coxe, agent of Rutherford county, shall be declared to be invalid, null and void, and that said Frank Coxe be ordered

to deliver the same to the Court, to the end that the same be cancelled and destroyed.

2d. That said Frank Coxe, agent as aforesaid, be perpetually enjoined and restrained from issuing or parting with said bonds for any purpose whatever, without the order or direction of the Court, or for the purpose of cancellation as aforesaid.

3d. That the said board of commissioners of Rutherford county be restrained and enjoined perpetually from levying or collecting any special or other tax for the payment of coupons of said bonds, or to create a sinking fund for the payment of said bonds, or the subscription of stock made to said Rutherford Railway Construction Company.

4th. That the Massachusetts and Southern Construction Company be enjoined and restrained from receiving from said Frank Coxe any of said bonds; and that said company be ordered by the Court to deliver up for cancellation any such of said bonds received by said company heretofore, or from using the same for any purpose or profit without the leave of the Court first had and obtained.

5th. That the Court declare that said election herein before described is null and void, and all actings and doings under it are null and void, and of no effect.

And for such other and further relief as the facts of the case and equity may require.

The complaint is verified, and upon it, a Judge at Chambers made an order that the defendant show cause at a time designated, why an injunction should not be granted as prayed for, pending the action and until the hearing upon the merits, and for the meantime, granted a restraining order.

Before the time to show cause, the defendants filed their answer, in which, after admitting some of the material allegations, they aver the regularity and validity of the election mentioned in the complaint in all material respects, and

deny that the defendant railway company are constructing their road on a line other than as allowed by their charter, and as matter of further defence they allege as follows:

"1. That at an election regularly and lawfully held in Rutherford county, on the 2d day of August, 1881, a majority of the qualified voters of said county voted for a subscription to the Rutherford and Spartanburg Railroad, under the provisions of an act, entitled "An act to authorize Rutherford county and other municipal corporations to subscribe to railroad stock."

2. That in pursuance of an act entitled "An act to incorporate the Rutherford Railway Construction Company," ratified the 6th of February, 1883, Act 1883, ch. 91, p. 141, the Board of Commissioners of Rutherford county, on the written request of one fifth of the voters of said county, caused an election to be held in the several precincts of said county, on the second day of August, 1883, for the purpose of submitting to the qualified voters thereof, the question whether the subscription of fifty thousand dollars, voted by said county on the — day of August, 1881, to the Rutherford and Spartanburg Railroad, may or may not be transferred and subscribed to the capital stock of the Rutherford Railway Construction Company, and also at the same time, the question of subscribing an additional $50,000 to the capital stock of the Rutherford Railway Construction Company.

3. That the Board of Commissioners declared solemnly, and so entered of record, that the election was carried for transfer and subscription.

4. That in pursuance of the charter, the county of Rutherford, through its agent, made a subscription of $100,000 to the Rutherford Railway Construction Company, which stock has been voted by it in the subsequent meetings of said company, and it is a regular and legal stockholder to that amount, in said company.

5. That in payment for said stock, the county commissioners delivered the $100,000 of county bonds to Frank Coxe, their agent, who holds them as agent for both the Rutherford Railway Construction Company and the county of Rutherford, under contract between the several parties.

6. That Frank Coxe has already paid out and delivered to the Massachusetts and Southern Construction Company, $10,000 of these bonds in payment for grading, and there has been done by said company a large amount of additional work, which will very soon entitle it to receive $20,000 more of said bonds, which work has been done on the strength of these bonds, and that said company now has a force of several hundred hands at work, and has expended large sums of money to complete the work, and entitle them to the bonds.

8. That under these several contracts, Frank Coxe, as agent of the Rutherford Railway Construction Company, is the *bona fide* holder of these bonds, the value of which has been paid to the county of Rutherford in stock of said company, and if there is any defect or irregularity in the issue of these bonds, these defendants had no notice of the same, and that said bonds are not now due, and will not be for ..... years.

9. That the Massachusetts and Southern Construction Company is a purchaser for value, and is a *bona fide* holder, without notice of any irregularity or other defect, of ten of these bonds.

10. That the judgment of the board of commissioners of Rutherford county, declaring that the election for "transfer" and "subscription" was carried, has not been impeached nor set aside by any direct proceeding, and that this judgment is binding on everybody until reversed.

11. That the plaintiff, as defendants are informed and believe, is well aware of all these subscriptions, contracts and issuing of bonds, and stood by and did not interfere

until the vested right of defendants had accrued, and as defendants are advised, it is now too late to invoke the extraordinary interference of a Court of Equity. Wherefore, defendants pray to be hence dismissed with their reasonable costs, &c., &c."

The plaintiff made reply to the answer, averring the truth of the allegations of the complaint, and especially as follows:

"2. The second paragraph of said answer is not admitted to be true, but on the contrary, the said election was not ordered in pursuance of the charter, in that it was not held at the written request of one fifth of the qualified voters of the county, the said petition not being signed as required by the act, and the said petitioners not alleging that they were qualified voters of the county, being in fact less than five hundred, and the qualified voters in the county at that time being three thousand, to the best of affiant's knowledge and information, after a full investigation. And said second defence is not true also, in this, that it does not appear, and in fact, there was no official and legal adjudication of the board of commissioners that one fifth of the qualified voters of the county had applied by written petition for said election.

3. In reply to the third paragraph of the answer, the plaintiff says that it is not true, as he is informed and believes, and avers the fact to be, that the Board of Commissioners ever compared the vote at said election, and adjudicated and declared the result at all, or as required by law, and the plaintiff reiterates the allegation, that in fact, the vote of 1,225 for "subscription" cast at said election, was not a majority of the qualified voters of the county; that said defendants were so informed at the time, and well knew. Nor does the affiant believe that 1,493 votes cast for "transfer," was a majority of the qualified voters of the county, nor

was there any public and legal notice of said election given to the electors.

4. In reply to the fourth allegation of the answer, he says, that $100,000 was not subscribed to said road in pursuance of the charter, and that the county of Rutherford had no legal authority to subscribe the same, or to ratify the same, at any subsequent meeting of the company.

5. In answer to the fifth paragraph of the answer, the plaintiff says that the said bonds were not signed and delivered to said Frank Coxe at Rutherfordton, but in Philadelphia, Penn., in the month of March, 1886, and after it was known and believed that an injunction would be applied for against their issue; that they were issued and delivered to forestall the plaintiff's action; done in the night, and secretly by the parties defendant, as will be more fully shown by affidavit submitted.

6. As to the sixth matter of defence, plaintiff says, that at the time $10,000 of bonds were delivered to the Massachusetts and Southern Construction Company, if the same were delivered at all, the said company had been notified, and had been long before, that said subscription of $50,000 had not been carried by a majority of the qualified voters of the county, and they had full notice of the defects in said vote and subscription. Plaintiff further answers and says, that he is informed and believes that Frank Coxe did not deliver said $10 000 of bonds to said company, but advanced his own money to operate with, and retained the bonds in his possession, and at the time he well knew the purpose of the plaintiff to contest the said matter. Plaintiff excepts to said answer, in that it does not state when these $10,000 of bonds were delivered to said company. He further avers, that much the greater part of the work done by the Massachusetts and Southern Construction Company to the alleged amount of $20,000 of bonds, has been done since the commencement of this action against it, and with full knowledge

thereof. For further answer, plaintiff says and avers, that the charter of the Rutherford Railway Construction Company requires the bonds to be delivered to the agents of the county, there being thirteen of them, constituted to receive the bonds and use them in the construction of the road, and that Frank Coxe had and has no legal right to hold and use the same.

8. In answer to the eighth paragraph of the defence, (that being No. 7,) the plaintiff is informed and believes, and avers that Frank Coxe is not the *bona fide* holder of said bonds in any other sense or manner than herein before stated, and that both he and the other defendants had notice of all the infirmities attached to said bonds and said subscriptions

9. The plaintiff denies the allegation of the ninth paragraph of the defence, and refers to the foregoing paragraph of the reply to defendants' several defences.

10. In reply to the tenth paragraph of the answer, the plaintiff denies the truth thereof, and says that there has been no comparison of the vote and adjudication of the result, and that there has been no judgment of said board binding and conclusive, or that cannot be impeached, as set forth in the complaint and in his answer to the several matters of defence as set forth in the answer of the defendants.

11. In reply to the eleventh allegation of the defence, the plaintiff says, that it is not true that the plaintiff stood by and did not interfere until the vested rights of the defendants had accrued, but on the contrary, he contended from the beginning that the "subscription" and "transfer" had not been carried by the legal vote, and it was well known that he did so contend. That, although the election was held in August, 1883, there was nothing done until long afterwards, but when the county proposed to issue the bonds, which was not until very recently, to-wit, in March, 1886, and when it

was clearly seen that the commissioners did intend to commit the county to the subscription, by issuing the bonds and imposing a tax upon the people, the plaintiff did oppose the same, and that thereafter, well knowing this, by contrivance and secret means, and to anticipate the action of the plaintiff, who was endeavoring to employ counsel to bring suit for an injunction, in the night-time signed said bonds, and they were carried next morning to Philadelphia, and the final execution of them was made by the register of deeds of said county, and the bonds then put in the hands of Coxe, and kept out of reach of the process of this Court, which will more fully appear in plaintiff's affidavit."

At the hearing of the motion for an injunction, numerous affidavits and much documentary evidence were produced by the parties. The Judge, after finding the facts upon which he based his judgment, stated his conclusions of law, and gave judgment as follows:

"1st. That a majority of those actually voting having cast their votes in favor of "subscription" and "transfer," at the election on the 2d day of August, 1883, absent voters are assumed in law to have assented, and it is not essential to the validity of the subscription, that a majority of all the resident voters of Rutherford county should have actually voted in favor of subscription.

2d. That the entry and order made by the board of county commissioners of Rutherford county, on the 7th day of August, A. D. 1886, is an adjudication on the part of said board, that a majority of the qualified voters of Rutherford county voted at said election, held on the 2d of August in favor of "subscription" and "transfer," and is conclusive as to that fact on all persons.

3d. That the bonds in controversy, being held by Frank Coxe, trustee, under the contract put in evidence, and the Massachusetts and Southern Construction Company having contracted obligations by reason of their beneficial interests

in said bonds in the hands of said trustee, holding under said contracts, said bonds are deemed in law to have passed into the hands of an innocent purchaser without notice, and their validity cannot be questioned by reason of any irregularity in the manner of holding said election, or in publication of notice for said election, or in the manner of issuing said bonds.

It is therefore ordered and adjudged by the Court, that the restraining order heretofore granted in this case, be vacated.

From this judgment, the plaintiff appealed to this Court.

Messrs. W. P. Bynum, E. C. Smith and *J. C. L. Harris*, for the plaintiff.

Messrs. D. Schenck and *Charles Price*, filed a brief for the defendants.

MERRIMON, J., (after stating the facts.) There is error in the first conclusion of law upon which the Court founded its judgment denying the motion for an injunction. It seems to have been governed by what was said—not decided—in *Reiger* v. *Commissioners*, 70 N. C., 319, and commented upon in *Norment* v. *Charlotte*, 85 N. C., 387. The interpretation suggested in the former case by the late Chief Justice PEARSON, of the phrase, "a majority of the qualified voters of the county, city, town, or other municipal corporation," is not the correct one, as has been expressly decided at the present Term, in the cases of *Southerland* v. *Goldsboro, ante*, and *Duke* v. *Brown, ante*.

In the latter case, the Chief Justice says that the term "qualified voters," as used in Art. VII, §7, of the Constitution, must be construed as embracing "those whose competency has been passed on in their admission to registration, as *prima facie* proof of the number, and of course this list being open to correction for deaths, removals and other causes sub-

sequently occurring, and perhaps for inherent disqualifications existing at the time of registration, and errors in admitting their names to the list."

An essential requisite of a qualified elector—voter—is, that he shall be registered as such. The Constitution (Art. VI., §§1, 2,) in prescribing the qualifications of electors, declares that the General Assembly shall, from time to time, provide "for the registration of all electors; *and no person shall be allowed to vote without registration.*"

The obvious purpose of this provision, is to ascertain who are entitled to vote, and to facilitate the exercise of the elective franchise by citizens so entitled, and to prevent unlawful voting, fraud, and confusion in all elections by the people.

A lawful registered elector, and only he, is a qualified voter in the sense of the Constitution; and, also in the sense of all statutes, nothing to the contrary appearing. Who were the qualified voters at a particular election, were those, and only those, who were then lawfully registered. Hence, when an election for any purpose is required to turn and depend upon the vote of a majority of the qualified voters of a county, city, town or other municipal corporation, and the election has been held, it becomes necessary to look to the registration books of the election to ascertain who were, and the whole number of the registered—"qualified voters"—at the election, subject to just scrutiny. It seems to us that the interpretation we have thus given to "qualified voters," is the necessary as well as the reasonable one.

We may add in this connection, that while the registration of electors is thus essential and very important, opportunity must be offered to all persons eligible to become qualified voters, to register as such, next before each election, as prescribed by law. The law encourages electors to vote, and it provides and intends that each person eligible shall have opportunity to qualify himself to that end, before an approach-

ing election. And if such opportunity shall be withheld or denied, on purpose, by accident, or by inadvertence, such denial would vitiate and render void the election, certainly if such denial should materially affect the result. *Perry* v. *Whitaker*, 71 N. C., 475; *VanBokkelan* v. *Canaday*, 73 N. C., 198.

Nor do we think the second conclusion of law upon which the Court based its judgment, correct. Accepting it as true, that the commissioners of Rutherford county did ascertain and declare the result of the election in question properly and sufficiently—and this by no means appears to be certain—their action in that respect, while it could not be attacked collaterally, was not conclusive, and it might be questioned and contested in an action brought directly for that purpose. It cannot be, that such a determination and exercise of authority by county commissioners, in respect to matters frequently involving questions and rights of great moment, are final and absolutely conclusive. There is certainly no statute that so provides, and the spirit and principle of law in regard to the settlement and determination of the rights of parties and the public, plainly imply the contrary.

The counsel for the appellants in their brief, cited and relied upon *Smallwood* v. *New Berne*, 90 N. C., 36. That case is not like, but very different from the present one. It decided that the decision of the mayor and commissioners of the city of New Berne could not be attacked collaterally in an action to restrain the collection of taxes, as was attempted to be done; but the Court said: "If the plaintiff was dissatisfied with the action of defendants in ascertaining the result of the vote in the respect mentioned, he ought, at the proper time, to have brought his action to question the truth and justice of their decision of the matter, and had the same reversed, declared irregular and void, or properly modified. There was a remedy, but that remedy cannot be had in an action like this." Nor did this Court say, or in-

tend to say to the contrary, in *Simpson* v. *Commissioners*, 84 N. C., 158; *Cain* v. *Commissioners*, 86 N. C., 8; and *Norment* v. *Charlotte*, 85 N. C., 387. These cases decide that the decision of the county commissioners in ascertaining the result of an election, cannot be contested collaterally, in an action to prevent the collection of taxes, made necessary by the result of such election. They do however, suggest a remedy that might have been invoked at the proper time.

The chief and leading purpose of this action, is to contest directly the regularity and validity of the election in question, including the ascertainment and declaration of the result thereof by the county commissioners. The plaintiff seeks to have the election adjudged void for the causes alleged, and prays for incidental equitable relief by injunction pending the action, and a perpetual injunction, &c. We can see no reason why this is not competent, although we need not now decide conclusively any question in this respect. It is true, the plaintiff did not bring his action at once after the result of the election was declared, or purported to be declared, to contest its validity, but it was not necessary that he should do so, until some action was about to be taken in pursuance of it. It might be, that the county authorities, seeing the election was irregular and void, would so treat and disregard it, in which case, an action to have it declared void would be unnecessary. It seems that the plaintiff gave notice of his purpose to bring his action, when, and as soon as it became necessary, and that he did bring it promptly after the commissioners manifested their purpose to act upon the result of the election. There is no statutory provision that requires such elections to be contested at once after they take place, and in a particular manner. It was therefore sufficient for the plaintiff to bring his action within a reasonable period, and in the ordinary method.

Now, the plaintiff alleges in his verified complaint, that the defendant county commissioners did not cause the elec-

tion mentioned to be held at the written request of one fifth of the qualified voters of the county named, but at the request of a less number; that no notice of the election was given; that the registration books for electors were not opened next before the election as required by law, in consequence of which many persons eligible to be electors did not have opportunity to register as such, and did not do so, and hence did not vote: that many of these persons would have voted against the subscription in question, if they had had opportunity to do so; that a majority of the qualified voters of the county did not vote in favor of "transfer" and "subscription;" that the result of this election was not ascertained and declared in the manner required by law, or at all; that, nevertheless, the defendant county commissioners undertook to subscribe for one hundred thousand dollars of the capital stock of the defendant railway company, and placed in the hands of the defendant Coxe, as trustee, one hundred thousand dollars of the bonds of the county to pay for such stock: that the defendant commissioners threaten to levy a tax on the taxable property of the tax-payers of that county to raise money to pay interest that may come due upon such bonds, and to provide a sinking fund to pay the principal thereof: that the defendants, each and all of them, had notice that a majority of the qualified voters of the county did not vote in favor of such subscription, and also notice of the irregularities and defects in the election as alleged: that the defendant Coxe is not a *bona fide* holder of the bonds so placed in his hands; that the election was held in August, 1883, but no steps were taken in pursuance of it, until in March, 1886; and that the defendants, knowing of the plaintiff's purpose to bring this action, covertly caused the bonds mentioned to be partially executed in said county, and clandestinely sent to Philadelphia, in the State of Pennsylvania, where they were finally executed, &c., &c.

Unquestionably, the plaintiff alleges a cause of action. The defendants admit some of the material allegations, but they deny that the election was in any material respect affected by irregularities—certainly not by such as rendered it void; and they insist, that the subscription for the capital stock mentioned, was legally and properly made, and also, that the bonds were in all respects legally issued, and passed into the hands of *bona fide* holders of them for value, and without notice of the alleged irregularities or defects in the issue of them.

As is our duty in such cases, we have carefully examined the affidavits and documentary evidence produced in support of and against the motion for an injunction. It is not necessary—perhaps proper—that we shall analyze it here, or make any formal findings of the facts. It is sufficient to say, that we are fully satisfied that the evidence tends strongly to prove the material allegations of the plaintiff, and we do not hesitate to decide that the Court ought to have granted an injunction as prayed for, pending the action, and until the hearing upon the merits. *Heilig* v. *Stokes*, 63 N. C., 612; *Coates* v. *Wilkes*, 92 N. C., 376; *Harrison* v. *Bray*, Ibid., 488; *Turner* v. *Cuthrell*, 94 N. C., 239; *Blackwell* v. *McElwee*, Ibid., 425.

Since the argument before us, the counsel for the appellees have presented for our consideration, an affidavit, in which it is stated that the bonds of the county of Rutherford, mentioned in the pleadings, have, since this appeal was taken, been delivered by the defendant trustee to the defendant the Massachusetts and Southern Construction Company, and it and the defendant the Rutherford Railway Construction Company have in all things and respects complied with their part of the contract, likewise mentioned in the pleadings, &c.

If this be true, and the facts could be brought before us in some appropriate way, it could not affect the chief pur-

pose of this action, which is, to have determined the validity or invalidity of the election in question. The defendants, other than the defendant commissioners, are properly made parties, merely for the purpose of enabling the plaintiff to obtain equitable relief by injunction against them, to prevent all the defendants from doing, under and in pursuance of what is alleged to be an invalid election, such things as might, and probably would, create complication that might prove injurious to the county named and the plaintiff, if the election should be declared void. The purpose is not to settle and determine the defendants' rights, other than the defendant county commissioners, except incidentally and to a limited extent, by the exercise of the power of restraint by injunction. Whatever the defendants have thus done, has certainly been done with notice of this action, and whatever is embraced by it; and they have proceeded at their peril.

There is error. To the end that an injunction pending the action may be granted, as demanded by the motion in the action for that purpose, let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. Reversed.

J. W. GOFORTH, in behalf of himself, &c., v. THE RUTHERFORD RAILWAY CONSTRUCTION COMPANY et als.

Elections—Innocent Purchasers—Municipal Subscriptions.

1. The ruling in the preceding case of *McDowell* v. *The Construction Co.*, affirmed.
2. The validity or invalidity of an election may be tested by an action, although it is alleged that innocent persons have acquired rights under the election as declared by the proper authorities. Such alleged innocent parties, although parties to the action, are not precluded by a judgment declaring the election void, but their rights must be tested by actions prosecuted for that purpose.

3. Where the question of subscription to two different railway corporations is to be submitted to a vote, it is improper and irregular to submit them as a single proposition, at the same election and on the same ballot.

(*McDowell* v. *The Construction Co.*, ante: cited and approved).

MOTION to continue an injunction to the hearing, made in an action pending in CLEVELAND Superior Court, heard before *MacRae, Judge*, at Chambers, in Lexington, on June 4, 1886.

The purpose of this action is to contest the validity of, and have adjudged void, an election caused to be held in the county of Cleveland, by the commissioners thereof, on the 29th day of August, 1885, to take the sense of the "qualified voters" upon the question, whether or not that county should, as allowed by the statute, (Acts 1883, ch. 141, §2; *The Code*, §1996,) subscribe to the capital stock of the defendant The Rutherford Railway Construction Company, to the amount of $75,000, and also to the capital stock of the Western Air-Line Railroad Company, to the amount of $50,000.

The plaintiff, a tax payer suing for himself and all others interested in like manner with himself, alleges in his complaint, that the election referred to was ordered to be held but by two of the defendant commissioners; that notice of such election was not given for the time required by law; that the registration books for the registration of electors were not opened, certainly in several townships, next before the election, so that many persons eligible to be voters at it, did not have opportunity to register and become qualified voters, who would—many of them—have voted against "subscription" for such stock; that a majority of the qualified voters of such county did not vote in favor of "subscription," as the defendant commissioners, or a part of them, falsely pretended to ascertain and determine; that the result of the said election was not duly ascertained and declared as pre-

scribed and required by law; that the said propositions to subscribe to the capital stock of the two companies mentioned, were coupled together and submitted at the election as one proposition, the purpose being unduly to induce qualified voters in different sections of the county to vote for "subscription" thus submitted, who would not do so if a distinct proposition as to each company had been fairly submitted upon its own merits, as the law required; that the defendant The Rutherford Railway Construction Company, at the time of the election, had not located the line of its road; that the voters supposed it would locate it as its charter prescribed; that after the election, however, it located its road on a line different from that expected, and one not allowed by its charter, thus misleading and deceiving many voters; that in pursuance of such unlawful and invalid election, the defendant commissioners have subscribed for $75,000 of the capital stock of the company last mentioned, and they are urged to issue and deliver the coupon bonds of the county to pay for the same, and a majority of them would do so, but the chairman of the board refuses to sign them; that the defendants, each and all of them, at the time of the subscription for the stock mentioned, well knew of and had notice of the alleged irregularities and defects in the election complained of, &c., &c., &c.

The plaintiff demands judgment as follows:

"I. That said election, so held and described as aforesaid, be declared by the Court to be null and void and of no legal effect whatever, and that all acts and doings of said board of commissioners, purporting to be under or by virtue of said election, be held, deemed and declared to be of no legal effect.

II. That the Board of Commissioners of Cleveland county, and the chairman thereof, or his successor in office, be perpetually enjoined from signing or delivering bonds for $75,000, or any other sum, in pursuance of said election, to

H. D. Lee & Co., trustees for said county, or to the Rutherford Railway Construction Company or its agents, or to the Massachusetts and Southern Construction Company or its agents or employés, or to any other person or body corporate.

III. That the subscription made as aforesaid to the Rutherford Railway Construction Company of $75,000 by the Board of Commissioners of Cleveland county, be declared by the Court to be illegal and void, and that the same be erased from the subscription list to the capital stock of said company.

IV. That said board of commissioners be restrained from assessing and levying a special or other tax upon the plaintiff and other tax payers of said county for the payment of said capital stock, as subscribed to the said company.

V. For such other relief in the premises as to justice and equity may appertain."

Upon motion of the plaintiff, at Chambers, on the 17th day of May, 1886, a Judge, upon consideration of the verified complaint, granted a rule upon the defendants to show cause why an injunction pending the action and until the hearing upon the merits, restraining the defendants from taking further action under and in pursuance of the election so alleged to be void, should not be granted, and also granted a restraining order, &c.

Afterwards, at Chambers, on the 4th of June, 1886, the Judge denied the motion for an injunction, and gave judgment in that respect, whereof the following is a copy:

"This case having been heard on complaint and answer, and affidavits filed, and the cause having been argued by counsel for both parties, the Court finds:

1. That the Board of Commissioners of Cleveland county did declare the result of the election, and that it is conclusive, contracts having been made by them and rights having accrued under this declaration.

2. That whether the road was located according to the charter, is not a ground for relief in this action against the issue of the bonds.

3. That the fact that a vote was taken upon the subscription to another road at the same time, does not invalidate the result as to this defendant company, for its charter was complied with.

It is, therefore, adjudged that the restraining order has expired, and that no injunction shall issue as prayed for."

From this judgment, the plaintiff appealed to this Court.

Messrs. W. P. Bynum and *E. C. Smith*, for the plaintiff.

Messrs. D. Schenck and *Chas. Price* filed a brief, for the defendants.

MERRIMON, J., (after stating the facts). In many material respects, this case is substantially like that of *McDowell* v. *The Construction Company*, decided at the present Term, and we refer to it as pertinent here.

The denial by the Court of a motion for an injunction, is founded mainly upon the erroneous view of the law as to the conclusive effect of the ascertained and declared result of the election in question by the county commissioners. The Court held erroneously, that this was conclusive. We have expressly held the contrary in the similar case above cited, and we will not here add to what is there said.

Nor is it true, as a conclusion of law, that, insomuch as the defendant commissioners have subscribed for shares of the capital stock of the defendant the Rutherford Railway Construction Company, and the latter has made engagements and contracts based upon that fact, the election cannot be contested, and its validity or invalidity determined, as is sought to be done by this action. The purpose of this action is to determine the validity or invalidity of the election—not rights of the defendant already accrued. They, other

than the defendant commissioners, are brought into it only in order that the plaintiff may have equitable relief by injunction as against them, to prevent future complications as to rights that might otherwise arise, if they should go further in pursuance of the election alleged to be void. If it turns out that the election is void, what effect that may have upon the defendants claiming rights that have arisen under an election seemingly regular, must be determined in an action or actions brought for the purpose of testing any question in that respect. Their rights, whatever they may be, cannot defeat or conclude this action. The plaintiff, and those having like rights with him in the action, may contest the validity of the election, without regard to what has been done by the defendants.

We may add, moreover, that it is alleged in the complaint, and the evidence tends sufficiently to prove it for the present purpose, that the defendants all had notice of the irregularities and defects in the election, and of the questionable authority of the defendant commissioners to act upon it, so that they cannot reasonably complain of possible results that may prove embarrassing to them.

We do not deem it necessary at this time, to decide what effect the taking of the vote upon the propositions to subscribe for stock of two distinct companies as a single proposition, may have upon the election, further than to say, that it was certainly irregular and improper to do so.

Manifestly, the plaintiff alleges a sufficient cause of action, and a careful examination of the evidence produced in support of and against the motion for an injunction, fully satisfies us that apparently—probably—he may succeed in establishing it. The Court ought therefore to have granted the injunction pending the action as prayed for by the plaintiff.

To the end that this may yet be done, let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

C. C. JONES et als. v. J. F. SLAUGHTER et als.

Executors and Administrators—Devastavit—Trusts—Appeal Bond.

1. Where a vendee dies before paying in full for the land, his estate is liable for the residue, and its payment by the administrator is proper.

2. If, in such case, the administrator pays the balance due out of the assets of the estate, but takes the title to himself individually, the heirs can have him decreed to be a trustee for them; or, *it seems*, that they can charge him with the payment as for a devastavit, and have it declared a charge on the land.

3. Where an action was brought by the next of kin and heir at law, against an administrator for an account and settlement of the estate, in which a consent decree was entered, discharging the administrator of all liabilities in regard to his acts, representative or individual, in managing the estate: *It was held*, that such decree released the administrator from the trusts upon which he held certain lands for the heirs.

4. A motion to dismiss because of imperfections in the undertaking on appeal, will not be entertained, unless the provisions of Ch. 121, Laws 1887, are complied with.

CIVIL ACTION, tried before *Shipp, Judge* at Spring Term, 1886, of CHEROKEE Superior Court.

After the appeal was docketed in this Court, the appellee moved to dismiss for non-compliance in giving and justifying the appeal bond, as required by *The Code*, §560, in that the sureties do not justify in double the amount thereof. This motion was filed on December 13th, 1886.

The facts upon the merits are as follows:

One Barclay McGhee, residing in Monroe county, Tennessee, in the month of June, 1853, entered into an agreement with Edward Delozier, a resident of Cherokee county in this State, for the purchase of an interest in certain entries of land in the last mentioned county, and after having made

advances in money therefor, died before consummating the contract. His widow, Mary K., who by a subsequent marriage became Mary K. Parker, administered on her husband's estate in Tennessee, but never took out letters in this State. In her capacity as such administratrix, in March, 1857, she entered into covenant relations, binding upon herself personally, with the said Edward Delozier, in which the latter undertook to sell and convey to her on perfecting his own title, several tracts therein described, containing one thousand acres, for the sum of $2,000, to be paid when the grants were issued, and $1,200 more, payable at the end of twelve months, and "also for the cancelling of all suits and claims between said parties," each paying his own costs. There was also this provision: "And it is understood that such stipulation shall bind the heirs, administrators and executors of the respective parties"; and one added as a postscript, that the said Mary K. shall pay $170 due the State, in addition, and the contract to become null if she fails to get a good warranty title to the premises. The money was subsequently paid, and the said Mary K. obtained grants from the State, which she caused to be issued to her as administratrix.

The present action is brought by two of the daughters of the deceased (Barclay) and their husbands, who have succeeded to the estate of three others, to whom, with said daughters as heirs at law and tenants in common, the equitable estate of said Barclay, becoming the legal estate in the administratrix after his death, as trustee, descended, to recover possession and have the defendant Cooper, to whom she has assigned, declared and held responsible as a succeeding trustee.

The defence relied on arises out of the final disposition by compromise of a suit wherein the present plaintiffs are parties, instituted in the Chancery Court of Monroe county,

Tennessee, for a full and final settlement of the trust estate in the hands of the said Mary K.

In her answer, she admits the receipt of large sums of money, and states in what manner it has been expended, mentioning among others, the payment of over $10,000 for the Tague School lands, and of $4,000 to said Edward Delozier, under advice of counsel, in adjusting a suit pending in this State between him and her deceased husband; and further, that she surrendered to a receiver in a former action, which seems to have been discontinued, personal property of the value of more than $13,000. If these disbursements are allowed, the answer avers, they exceed what she is strictly accountable for.

Thereupon, a reference was ordered, to ascertain: (1.) what amount of personal assets have come, or ought to have come into the defendant's hands; (2.) how the same have been disbursed; (3.) what debts, if any, remain unpaid, and to whom due; and, (4.) what is due to the children of the deceased, of the sums adjudged to be paid by her to them, for excess in value of the dower assigned to her. Pending this reference, a compromise was agreed upon, and a decree entered in this form:

"Be it remembered, this cause came on to be heard before the Honorable W. M. Bradford, on the 5th day of June, 1878, and the complainants to this cause producing in open Court a written compromise signed by all the parties, and duly acknowledged before the clerk of the County Court, and which is in the words and figures following, to-wit:

C. C. JONES and wife *et al.*
vs.
MARY K. PARKER, administratrix, *et al.*
} In the Chancery Court at Madisonville, Tennessee.

"The several parties to the above entitled cause, hereby agree to adjust and compromise all matters of controversy thereto upon the following terms, to-wit:

"1. The said Mary K. Parker, by her settlement therein before the clerk and master, shows herself to be indebted to the estate of Barclay McGhee, deceased, in the sum of twenty-four thousand six hundred and eighty-five dollars and seventeen cents.

"2. The said Mary K. Parker is indebted to the surviving children of said Barclay McGhee, in the sum of one hundred dollars per year from the first day of January, 1859. Making an aggregate of thirty-two hundred and one dollars and fifty cents.

"3. In satisfaction of the sums thus ascertained to be due as aforesaid, and in full discharge and acquittance of said Mary K. Parker, both in her said representative capacity and in her individual and personal capacity, from all liability to said estate, and to the said children of Barclay McGhee, deceased, the latter hereby agree to accept the dower interest upon which the said Mary K. Parker now resides, to be divided between them by disinterested persons selected for that purpose, in equal parts according to the laws of descent and distribution.

"4. It is agreed, that said children, together with their husbands, to-wit: C. C. Jones and wife Margaret W., J. R. Jones and wife Bettie M., John B. McGhee and Ann R. McGhee, shall, and by this instrument do bind themselves, to pay to the said Mary K. Parker, for and during the term of her natural life, the sum of twelve hundred and fifty dollars annually. That is to say, each of said parties shall pay to the said Mary K. the sum of two hundred and fifty dollars per year, payable on the first day of May of each year. But it is understood and agreed that said liability is several, neither being liable for the defaults of the other. It is further understood and agreed, that inasmuch as the said John B. McGhee has rented the dower interest, that for the current year the said John shall continue to occupy and enjoy said interest, and shall pay to the said Mary K. the

amount due for the current year, at the end of which time, say about the 13th of October, 1878, the said John shall surrender to the several parties entitled, the respective interests awarded them by the commissioners appointed to partition said interest.

"5. For the security of said several sums of two hundred and fifty dollars, due as aforesaid by each of said parties, it is hereby agreed that said Mary K. Parker shall have and retain a lien upon the said dower interest, which shall attach to the parts assigned to said several parties respectively, and be a charge upon said several interests for the amount due, until paid by the party who may owe the same; the lien herein provided for being several in like manner as the payments.

"6. It is further agreed that the commissioners to be appointed to partition said land, be and they are hereby instructed to so partition said land, that the portions awarded to Ann E. McGhee shall include the mansion-house now occupied by the said Mary K. Parker.

"7. If is further agreed that a decree be entered in this case in conformity with the terms of this agreement, accepting said dower interest in full satisfaction of all liabilities on the part of the said Mary K. Parker, on account of all matters connected with the estate of the said Barclay McGhee, deceased, whether in her representative or personal capacity, and discharging and releasing her from her trust as administratrix of said estate.

"8. The said suit to be dismissed by complainant at the cost of the defendant Mary K. Parker.

"9. The legal title to the life interest of the said Mary K. Parker in said dower lands, being now in E. E. Griffith, as trustee, by deed dated the 4th of March, 1861, which appears of record, it is agreed that said Griffith, as trustee, may, and he is hereby directed by said Mary K. Parker, to execute to

the children of B. McGhee, deceased, jointly, a quitclaim of all the interest remaining in him as such trustee.

"10. This agreement to be acknowledged and signed by all the parties in proper legal form. Otherwise, and until signed and acknowledged by all of the parties to it, it is to be considered as no agreement, and as containing no admission against the parties."

The division provided for was accordingly made, and the separate shares assigned to the five tenants, and report thereof made and confirmed. Upon this evidence, the Court intimated an opinion that the compromise and the decree carrying it into effect, embraced the subject-matter of the present action, and that it could not be maintained. The plaintiffs thereupon suffered a nonsuit, and appealed.

No counsel for the plaintiffs.

Messrs. F. H. Busbee, E. C. Smith and *Cooper*, for the defendants.

SMITH, C. J., (after stating the facts). While the chancery suit was for an account of the administration of the personal estate of the deceased, the surrender of the life estate of the administratrix, charged with the specified annuity to be paid her, is accepted "in full satisfaction of all liabilities" incurred by her, "on account of all matters connected with the estate of Barclay McGhee, deceased, whether in her representative or personal capacity, and discharging and releasing her from her trust as administratrix of said estate." The exoneration is sweeping, and without qualification or exception.

The administratrix was bound to discharge out of the assets of the estate in her hands, the remaining indebtedness which the deceased had incurred in buying the lands in Cherokee county from Delozier, and had this simply been done, the entire equitable estate would have vested in the plaintiffs, the heirs at law, and the sum so paid would be a proper

expenditure to be allowed in the administration account; and so it is included in the order of reference. But instead of this, the administratrix entered into a new contract, professing to act in her representative capacity, but imposing only a personal obligation on herself, with Delozier, and after full payment, took out grants in her own name, but therein designated as administratrix, on the land entries, and thus, as trustee, she becomes responsible to the heirs, in whom had vested the equitable estate, if they chose to so elect, or they had perhaps, a right to charge her with the moneys thus used, as upon a *devastavit* in taking title to herself, and also to charge the land with its payment. At all events, in one aspect of the case or another, these demands might have been adjusted in the suit, and even if out of its proper scope, were evidently in view in the comprehensive exoneration of the administratrix from "all liabilities" in connection with her acts, representative and individual, in managing the trust estate. This entire immunity is the consideration of the transfer of her dower estate, and leaves her not only in possession of the legal estate in the Cherokee lands, but that estate unfettered by any trust, and, in such condition, transferable by her deed. She has so conveyed to the defendant Cooper, with no attaching trusts, and the action against him cannot be maintained.

There is no error in the ruling, and the judgment must be affirmed.

The motion to dismiss this appeal is refused, under the provisions of the recent statute. Acts of 1887, ch. 121.

No error. Affirmed.

JOHN B. LEATHERS v. WM. J. GRAY.

Rule in Shelley's Case.

Where a will devised land to L during her natural life, and after her death to the begotten heirs or heiresses of her body; *It was held*, that the rule in Shelley's case did not apply, and the children of L took a remainder as purchasers after her death.

(*Jarvis* v. *Wyatt*, 4 Hawks, 254; *King* v. *Utley*, 85 N. C., 61; cited).

This was a CIVIL ACTION, tried before *Connor*, *Judge*, at the November Term, 1886, of ORANGE Superior Court, upon the following case agreed:

I. That by the will of Joseph Armstrong, dated the 23d day of May, 1839, and duly admitted to probate at November Term, 1840, it is provided: "I also give to the said Peggy Armstrong the use, service, or benefit of all the following property named in this clause, during her natural life, or marriage, and no longer, to-wit: three tracts or parcels of land, all being on the waters of Flat river. First, the tract that my father, William Armstrong, lived and died on, containing 220 acres; the second is a tract that I bought from Henry Berry, containing 17 acres; the third is a tract that I bought from my brother, William Armstrong, containing 216 acres." And by the same will it is further provided: "I also give and bequeath to my son, James W. Armstrong, the following property, to be received as soon as convenient after the death or marriage of his mother, Peggy Armstrong, viz.: one half of three tracts of land, all lying on the waters of Flat river. The first is the tract my father lived and died on, containing 220 acres; the second is the tract that I bought from Henry Berry, containing 17 acres; and the third is a tract that I bought from my brother, William Armstrong, containing 216 acres," and also: "I give and bequeath to my daughter, Parthenia Leathers, during her natural life, and

after her death, to the begotten heirs or heiresses of her body forever, one half of three tracts of land, all lying on the waters of Flat river. The first tract is the tract my father, William Armstrong, lived and died on, containing 220 acres; the second is a tract that I bought from Henry Berry, containing 17 acres; and the third is a tract that I bought from my brother, William Armstrong, containing 216 acres, to be received as soon as convenient after the death of her mother, Peggy Armstrong." William J. Gray was a witness to said will, and proved the execution thereof.

II. That on the 5th day of December, 1845, John B. Leathers and Parthenia and J. W. Armstrong, by J. B. Leathers, his agent and attorney in fact, duly appointed (Peggy Armstrong then being dead), executed to the defendant William J. Gray, in consideration of the sum of seventeen hundred and sixty dollars and twenty-five cents, a fee simple deed to the above described lands, with warranty, and said lands are described as bounded as follows: (giving metes and bounds), containing four hundred and seventy acres more or less, lying in the counties of Orange and Person, on the waters of Flat river, adjoining the lands of Chas. Holeman, Henry Berry, James Holeman and others, and the said William J. Gray has been in the continued uninterrupted possession of said lands since that time.

III. That Parthenia Leathers died on the 29th of November, 1885, and her husband, J. B. Leathers, died August 21st, 1880, and the plaintiff John B. Leathers is one of the two children of said J. B. and P. Leathers, now 36 years of age, the other child, F. S. Leathers, having, on January 4th, 1886, executed a quitclaim deed to W. J. Gray to said land."

Upon these facts, his Honor rendered the following judgment: "Upon the foregoing facts agreed upon between the plaintiff and the defendant, I am of opinion that by the operation of the Rule in Shelley's case, the plaintiff's mother, Parthenia Leathers, took, under the will of Joseph Armstrong,

a fee simple estate in the share of the lands devised to her—the will having been made and the conveyance by her to the defendant prior to 1856. The question of the effect of the act of 1856, (§1329 of *The Code,*) cannot arise. The deed executed in 1845 by said Parthenia Leathers and her husband, conveyed to the defendant a fee simple estate, and the plaintiff is not entitled to recover.

"The plaintiff will therefore take nothing by his suit, and the defendant will recover judgment against him and his surety for the cost in this behalf expended."

From this judgment the plaintiff appealed.

Mr. John Manning, for the plaintiff.

Messrs. John W. Graham and *John Devereux, Jr.,* for the defendant.

DAVIS, J., (after stating the facts). The sole question presented for our consideration is, did Parthenia Leathers take an estate in fee, under the will of Joseph Armstrong, by the operation of the Rule in Shelley's case—or did she take only an estate for life, with remainder to her children? In what sense were the words "heirs or heiresses" used by the testator? Were they used to denote the indefinite succession of persons *in infinitum,* technically designated by the word "*heirs?*" If so, the Rule in Shelley's case applies, and Parthenia took an estate in fee.

Prof. Minor, in his "Institutes," page 395, says: "The rule is not a means to *discover the intention* of the grantor or testator, but supposing the intention ascertained, the rule *controls it,* giving effect to the *general and legal,* rather than to the *more particular and prescribed* intent. The party making such a limitation, has in his mind two purposes, which are legally in conflict. One is to give the ancestor only a life estate; the other to limit the land to his heirs collectively, and in indefinite succession. These two intents cannot stand

together, without more or less of general mischief to the public welfare; and the rule prevails, simply to subordinate the particular, and apparently less important design of limiting the ancestor's interest to a life estate, to the more comprehensive, and probably the preferred purpose of transmitting the inheritance in the manner indicated. If this double intent appears, the rule must prevail, but if it can be plainly collected from the will, that the testator used the word "heirs," as a *descriptio personarum*, then the rule in *Shelley's case* is not applicable. The word "heirs," or "heirs of the body," must be used in its *technical* sense, as importing a class of persons to *take indefinitely in succession*. Hence, if it appears that the words were not employed in this sense, but inaccurately, as designating particular individuals only, the rule in *Shelley's case* would not be applicable; but the persons who, at the time of the limitation, were the ancestor's heirs apparent, or presumptive, would take a vested remainder." Minor's Institutes, 395.

In the case of *Jarvis* v. *Wyatt*, 4 Hawks, 254, an effect was given to the words, "heirs of the body," which seems not to have been followed or referred to in subsequent cases in this State. In that case Judge HALL says: "But there is another view of this case, taken by my brother HENDERSON, to which I altogether subscribe, which leads to the same result; and that is, that the words "heirs of the body," give an estate in fee by *purchase*, although there is an estate for life to the parent preceding it, because *heirs of the body* are not *heirs general*, and our law, since estates in tail are done away with, recognizes none as *heirs*, except such as can inherit collaterally as well as lineally; and that, although when there is an estate for life to the parent with remainder to his *heirs*, both estates unite in the parent, under the operations of *Shelley's case;* yet there can be no such union when the remainder is to heirs of the body. Our law knows of no such heirs; of course they are words of description, and those that take under them must

take as *purchasers*. In England the case is otherwise, because heirs of the body are recognized as heirs, and can inherit as such."

A different view from this was taken in the case of *King* v. *Utley*, 85 N. C., 61. Although the rule in *Shelley's case* was more strictly observed in England than in the United States, even there where it clearly appears that the words *heirs* or *heirs of the body*, were intended by the testator as *descriptio personæ*, they are words of purchase; Theoball's Law of Wills, 340–342, and the numerous cases there cited.

Any superadded word that would change the course of indefinite succession, implied by the word "heirs" in its technical sense, takes the case out of the operation of the rule, as for instance, in England, when the gift is for life, "remainder to heirs *female*," for that is a change of the course of descent.

Were the words "heirs or heiresses," used by the testator, Joseph Armstrong, in a technical sense; or, did he mean by them, children—"sons and daughters?"

In the same clause of the will, he gave to his son, James W. Armstrong, one half of the land absolutely, and if he intended that Parthenia should have a similar estate, why should the form of the gift have been changed?

Why give it to her for "her natural life," if he intended that she should have a fee? And why add the words "or heiresses," if he meant to use the words technically?

We think the words "heirs or heiresses," used in the will of Joseph Armstrong were intended in no technical sense, but in a sense not unusual, as children—*sons* or *daughters*—and that the rule in Shelley's case does not apply.

It would often defeat the intention of testators if wills written *inops consillii*, should be construed technically; and we think the intent of the testator in this case is apparent, and that is, that Parthenia should have only a life estate,

and that a new *stock* of inheritance should be created in her sons and daughters.

There is error. Let this be certified.

Error. Reversed.

FIELDING KNOTT et als. v. JOHN R. TAYLOR and wife.

Amendment—Finding of Facts.

1. The Courts have inherent power to allow amendments to pleadings, independent of *The Code*, which they may allow in their discretion, unless prohibited by some statute, or unless some vested right will be disturbed.
2. Under the provisions of *The Code*, the Courts have the power both before and after judgment, to allow amendments to the pleadings, when they do not substantially change the cause of action or defence.
3. Where the case is left by consent to be tried both as to the facts and the law by the Judge, and he fails to find some material fact, it will be remanded in order that such fact may be found.

CIVIL ACTION, tried before *Clark, Judge*, at January Term, 1886, of GRANVILLE Superior Court.

The defendants appealed.

The facts appear in the opinion.

Mr. John W. Hays, for the plaintiffs.

Messrs. Jos. B. Batchelor and *John Devereux, Jr.*, for the defendants.

DAVIS, J. This action was brought to the Spring Term, 1883, of Granville Superior Court, and complaint and answer were then filed. An amendment to the answer and reply was filed at Fall Term, 1883, and the cause continued

from term to term till November Term, 1885, when the following order was made:

"Ordered in this cause, that the plaintiffs be allowed to amend their complaint so as to set forth therein the matters stated in their reply to the defendants' answer and counter-claim."

To this order, made by Gilmer, Judge, the following exception is entered: "The defendants except to the granting of the foregoing order."

Then appears the following entry:

"1. The defendants, John R. Taylor and wife, Mary, now come and move the Court to strike out allegation one of plaintiffs' reply.

2. To strike out allegation two of plaintiffs' reply.

3. To strike out allegations five, six and seven of plaintiffs' reply.

4. To strike out allegations nine and ten of plaintiffs' reply.

5. To strike out allegations twelve and thirteen of plaintiffs' reply. And the case is continued."

No action appears from the record to have been had on the defendants' motion, and no appeal was taken, or right of appeal reserved, from the order of the Judge granting the amendment to the complaint: and an amended complaint, answer to the same, with a counter-claim and reply, were filed, and the action was tried before Clark, Judge, at the January Term, 1886, who, by agreement of the parties, decided questions of fact as well as law.

The case on appeal does not contain the exceptions to the order made at November Term allowing the amendment to the complaint, but it comes up in the record, and it is insisted that the Court had no power to allow the amendment, because it so changed the complaint, as, in effect, to constitute a new action, based upon a different cause of action from that which the plaintiffs commenced. Considering it

as if the right of appeal had been reserved, we think it was within the discretion of the Court to allow the amendment.

The parties were all before the Court—there was no change of parties—there was no surprise, but ample time to answer, and the defendants were deprived of no defence of which they could have availed themselves, if the complaint, so amended, had been originally filed.

That the Courts have the inherent power, independent of *The Code*, to amend pleadings, which they may exercise at their discretion, unless prohibited by some enactment, or unless some vested right is disturbed, or the rights of parties are injuriously affected, is well settled. This discretion, when its exercise is required in furtherance of justice, is extended by §273 of *The Code*, not only to amendments *before*, but *after* judgment, and even to the extent of conforming the pleadings or proceeding to the fact proved, when it does not change substantially the claim or defence. The substantial claim of the plaintiffs, as alleged in their original complaint, is to be protected against the enforcement of a judgment upon which a writ of possession had been sued out by the defendants, and there is nothing in the amended complaint in conflict with this substantial claim; nor is there anything in it to deprive the defendants of the substantial defence relied on by them. We think there was no error in allowing the amendment.

But there are facts alleged and denied—material, in our view—which the Court did not pass upon and find.

The plaintiffs offered in evidence a transcript of the record of the case of William Pannill against Anne Walker and others, in the Court of Equity for the District of Hillsboro. The defendants objected to this evidence, first, because it was not attested by the seal of the Court; second, because the transcript was imperfect, in giving only the purport or abstract of orders, &c. The Court, without finding how the

fact was, overruled the objection and admitted the evidence, to which defendants excepted.

The plaintiffs allege that an action of ejectment was commenced in the Superior Court of Law of Granville county, in 1852, by the defendants in this action, against one Joseph H. Gooch, for the recovery of the land in controversy; that said action was removed to the Superior Court of the county of Warren, and was pending in said Court, without final determination when the late war came on, when it was abandoned by the plaintiffs therein, (the defendants in this action,) and disappeared from the docket. They further allege, that at the Fall Term, 1878, of said Court, the cause was re-instated at the instance of the plaintiffs therein, and judgment by default entered against Jos. H. Gooch, the defendant named therein. That the said Gooch was dead when the proceedings were had; that his heirs were not made parties, and that no notice was given to any representative of said Gooch, or of his estate, at or before the time of re-instating said suit, or of the judgment, and that the suit abated.

The defendants deny that the suit was abandoned, or that it abated, and say that it was pending, having been brought forward on the new docket, under *The Code*, but at what time this was done they are ignorant, "not having had an opportunity recently to examine the records of said Court to ascertain," &c.

None of these facts are passed upon and found, and the cause is remanded, with the intent, that by proper inquiry they may be ascertained.

Remanded.

MARY C. ROBBINS v. ISAAC HARRIS et als.

Probate and Privy Examination—Description of Land in a Deed—Amendment.

1. The privy examination of a *feme covert* which sets out that she signed the deed of her own free will and accord, and without any compulsion of her husband, is sufficient, without adding the words, "and doth voluntarily assent thereto."

2. Where under the old system, it appeared that an order was made appointing a justice of the peace to take a privy examination, it will be presumed that the justice was a member of the County Court appointed for that purpose.

3. A description of land in a deed, describing it as all the interest, right, title and claim the grantors may have in the estate of the deceased father of one of them, more particularly one undivided seventh share which descended to the grantor from her father, is sufficient to admit of parol evidence to fit the description to the thing.

4. Where the cause of action set out in the complaint was to recover land descended to the plaintiff from her father, the Court has no power to allow an amendment at the trial so as to allow the plaintiff to claim a different interest as heir of her sister, as this would be not an amendment, but substantially bringing a new suit.

(*Joyner* v. *Faulcon*, 2 Ired. Eq., 386; *Beckwith* v. *Lamb*, 13 Ired., 400; *Etheridge* v. *Ferebee*, 9 Ired., 312; *Justice* v. *Etheridge*, 86 N. C., 244; *Gilbert* v. *James*, 86 N. C., 244; cited and approved).

CIVIL ACTION, tried before *Boykin, Judge,* at Fall Term, 1886, of IREDELL Superior Court.

The Court having intimated that on the evidence the plaintiff could not recover, she submitted to a nonsuit, and appealed.

The facts appear in the opinion.

Messrs. M. L. McCorkle and *D. M. Furches,* for the plaintiff.
Mr. C. H. Armfield, for the defendants.

SMITH, C. J. The complaint alleges, "that the plaintiff is the owner of an undivided one fifth of the following piece or tract of land, lying in the county of Iredell and State of North Carolina, in and near the town of Mooresville in said county, joining lands or lots of John Moore, Robert McPherson and others, and known as the William Brawley tract, and which descended to the plaintiff from her father, William Brawley"; and further, that the defendants, who, with those under whom they claim, have been in possession and in the pernancy of the profits for more than twenty years, still retain and wrongfully refuse to surrender the premises.

The defendants' answer puts in issue the plaintiff's title, and this seems to have been the only subject-matter in controversy, though no formal issue is shown in the record to have been prepared and submitted to the jury, as we have repeatedly said must be done.

Upon the trial, and in support of the defence, the defendants offered in evidence a deed executed in August, 1845, by the plaintiff and her husband William, since deceased, to William A. Brawley, wherein they sell, release, and quit-claim to him and his heirs, property thus described: "All the interest, right, title and claim they may have in the estate of her father, William A. Brawley, deceased, more particularly an undivided seventh share, which descended to said Mary Catharine from her father, of all the lands of his estate, and also such share of the personalty as they are entitled to in said estate."

The probate of the deed is in this form:

"STATE OF NORTH CAROLINA, IREDELL COUNTY. } *Court of Pleas and Quarter Sessions,* August Term. 1845.

The execution of the within deed was duly acknowledged in open Court. It is recorded and ordered to be registered.

Test: J. F. ALEXANDER, *Clerk.*

"Ordered by the Court, that A. C. McIntosh, Esq., be appointed to take the private examination of Mary C. Robbins, separate and apart from her husband, William Robbins, touching her voluntary execution of the within deed.

Test: J. F. ALEXANDER, *Clerk.*

"Pursuant to the above order, I certify that I proceeded to take the examination of Mary C. Robbins, separate and apart from her husband, who declares that she signed the within deed freely and voluntarily, and of her own will, without any coercion or compulsion on the part of her said husband.

In testimony whereof, I have hereunto set my hand and seal, this 19th day of August, 1845.

A. C. MCINTOSH, J. P. [Seal.]

Registered 29th September, 1845."

Objection was made to the introduction of the deed, and to its efficacy, upon the ground of an insufficient probate, and the indefiniteness of the description of the land, the interest in which it purports to convey.

The objection was overruled, the Court holding the probate to be sufficient to pass the plaintiff's estate, and the land capable of location by parol and other proof of ownership and possession in the deceased intestate. To this ruling the plaintiff excepts.

I. The form of probate:

The cases of *Joyner* v. *Faulcon*, 2 Ired. Eq, 386–392; *Beckwith* v. *Lamb*, 13 Ired., 400; and *Etheridge* v. *Ferebee*, 9 Ired., 312, fully sustain the ruling of the Court, and the sufficiency of the proceedings in proof of the execution of the deed to pass the estate of the *feme covert* in the land. In the last case, in answer to similar exceptions, the Court says. PEARSON, J., speaking in its behalf: "A deed is acknowledged by husband and wife in open Court—two justices of the peace there-

upon take the privy examination, and report to the Court, and the Court acts upon the report. The inference is irresistible, that the two justices were members of the Court appointed for that purpose."

It is also decided, that a declaration of the *feme* upon her private examination, that she signed the deed "with her own free will and accord, and without any compulsion of her husband," is sufficient without adding "and doth voluntarily assent thereto." Nor does the order in which the entries appear affect the result. These are but parts of one transaction, taking place at one and the same sitting of the Court, and together form a complete record. *Joyner* v. *Faulcon*, *supra*.

II. The descriptive words:

They are such as, when it is shown what lands were owned by the intestate, and from whom the descended share conveyed is derived, to designate and locate as fully as if more minutely described as to place, quantity, boundary, or other particular. In wills, this is not an uncommon form of devise, and whether by will or deed, it is only necessary so to refer to the subject, that its *identity* can be ascertained with the aid of evidence "fitting the description to the thing described," upon the maxim, "*id certum est, quod certum reddi potest*," cited in *Justice* v. *Eddings*, 75 N. C., 581, and other cases.

A description quite as vague as that in the present case, was held to be sufficient in *Gilbert* v. *James*, 86 N. C., 244–249, the words being, "all their right, title, interest and claim they have now, or may hereafter have, in and to the estate, personal and real, belonging to the estate of Solomon Martin, deceased, Nancy Meadows being a daughter of Solomon Martin, deceased, and they being heirs to one fourth of the real estate, there being three other children, and one fifth of the personal estate, there being a widow also."

III. Finding herself unable to recover the one fifth share demanded in the complaint as "descended to the plaintiff

from her father, William Brawley," her counsel asked leave to amend, so as to include the share coming to her from two deceased sisters, one of whom died in 1842, the other in 1859, unmarried and under age. This was refused, the Court being of opinion that the power to allow it was not conferred.

The action was instituted on July 20th, 1885, when these estates could have been embraced in the complaint, and were omitted. The amendment would have introduced a new cause of action, and changed the essential nature of the controversy as prosecuted up to the trial. It would have been in effect to convert defeat into success, and if the practice was tolerated, would be to subvert and displace the pleadings, and produce uncertainty and confusion. It is a case of failure of proof; *The Code*, §271, and irremediable under §273. While the refusal was eminently proper as an act of discretion not reviewable, the exercise of the power is not allowed in cases where such results follow.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

APPENDIX.

PROCEEDINGS IN MEMORY OF

THOMAS S. ASHE.

In Supreme Court, Feb. 7th, 1887.

Upon the opening of the Court, the Attorney-General announced the death of Thomas S. Ashe, an Associate Justice, and the Court adjourned in honor of his memory.

A meeting of the Bar was then held, Mr. Thomas C. Fuller being chosen Chairman, and Mr. John Devereux, Jr., Secretary. A committee, consisting of Messrs. W. H. Day, D. G. Fowle, Thos. S. Kenan, Robt. T. Gray, F. D. Winston, Wm. J. Griffin, Sam'l J. Pemberton, Henry B. Adams and Walter L. Parsons, was appointed to prepare a memoir and resolutions commemorative of the life and character of the deceased, and on motion of Mr. Thos. S. Kenan, the meeting adjourned to meet in the Senate Chamber on a day to be fixed by the Chair.

Adjourned Meeting.

In the Senate Chamber, Feb. 16th, 1887.

The Chairman called the meeting to order, and Mr. S. F. Mordecai acted as Secretary, in the absence of Mr. Devereux, who was detained by sickness.

Mr. Kenan, for the committee, submitted the following report:

MR. CHAIRMAN: The committee appointed at a meeting of the Bar held in the Supreme Court room on Monday, the 7th of February, 1887, to prepare resolutions commemorative of the life and character of the late Hon. THOMAS S. ASHE, an Associate Justice of the Supreme Court of the State, respectfully submit the following report:

THOMAS SAMUEL ASHE was born in Orange county, N. C., on the 21st of July, 1812. He was the son of Paschal P. Ashe and Eliza Strudwick Ashe; received an academic education at Bingham School; was graduated from the University at Chapel Hill in 1832; read law with the late Chief Justice RUFFIN, received his license to practice his profession and located in Wadesboro, Anson county, in 1836.

On the 13th of June, 1837, he was married to Caroline Burgwin, daughter of George Burgwin, of the county of New Hanover.

He represented Anson county in the House of Commons in 1842, and in the Senate in 1854, and was Solicitor of the Judicial District in which he resided from 1848 to 1852. He was nominated for Congress in 1858, but declined the nomination.

In 1861 he was elected as a Delegate to the State Constitutional Convention, which, however, was not called at that time, a majority of the popular vote being adverse.

He was a member of the Confederate House of Representatives, and while serving his term was elected by the Legislature as a Senator of the Confederate States.

In 1868 he was the Democratic candidate for Governor of the State. In 1872 he was elected as a Representative in the United States Congress, and re-elected in 1874.

In 1878 he was nominated and elected an Associate Justice of the Supreme Court, and re-elected in 1886.

He was a Vestryman of Calvary Church at Wadesboro for thirty-two years, and died at his home in that town at 11:45 A. M., on Friday, the 4th day of February, 1887, in his 75th year.

In the various relations of life, Judge ASHE was excellent. Within the bosom of his family he was tender and gentle; among his friends he was courteous, generous and thoughtful of others more than of himself; at the bar he was able, conscientious and candid; on the bench he was learned and patient and faithful. Seldom has such fine physical manhood been united with so much sterling worth, superior ability and splendid character. He filled many places of public trust, and all with credit to himself and honor to the State. Called eight years ago to the highest judicial station, he wore the ermine with great dignity and acceptability, and left in his opinions an enduring monument to his fame.

Among his chief characteristics were a rare modesty, a high spirit of personal independence, a manly courage, and inflexible virtue. His disposition was kindly; his impulses were chivalrous and noble, and his

sentiments exalted; and candor and truth were the groundwork of his nature.

Such a combination of excellencies won the respect, esteem and admiration of his fellow-citizens, and his death is mourned throughout the bounds of his native State.

Resolved, That the Attorney-General be requested to present these proceedings to the Supreme Court and move that they be spread upon the minutes, and that a copy under the seal of the Court be transmitted to the family of the deceased.

Respectfully submitted,

WM. H. DAY,
DAN'L G. FOWLE,
THOS. S. KENAN,
ROBT. T. GRAY,
F. D. WINSTON,
WM. J. GRIFFIN,
HENRY B. ADAMS,
SAMUEL J. PEMBERTON,
WALTER L. PARSONS,
Committee.

REMARKS OF MR. WM. J. GRIFFIN.

MR. CHAIRMAN: In accordance with an old and honored custom, we are assembled here to-day to pay a tribute of respect to the memory of the late THOMAS S. ASHE. What custom should be more honored? Where should it receive greater reverence? Alone for North Carolinians it seems that oblivion treads upon the very heels of death. Men, whose images in other places are preserved in lasting monuments, with us are preserved only in memory. They live, they die, and are forgotten. This State has produced men who have achieved greatness, and who died in the full possession of it, but no marble preserves their image, and save their official record of duty well performed, there is absolutely nothing to tell the stranger that North Carolina has ever reared a man whose memory is worth cherishing. This State has produced true statesmen, but in her legislative halls it is not the bust of Macon or Badger that inspires her legislators, but that of an honored son of a sister State. Though foremost in patriotism, as evinced by the glorious Mecklenburg Declaration, it is the Virginia patriot who has received recognition in North Carolina.

When we reflect upon this, Mr. Chairman, it is especially pleasing to be permitted to perpetuate as far as possible the memory of a true North Carolinian.

The late THOMAS S. ASHE was a native son of North Carolina—sprung from a long line of honored ancestry. He received his education within the State, and having chosen the law as his profession, devoted himself

to its study with energy and success. He rapidly came to the front, and his ability was universally recognized. But he possessed other and greater qualities than that of ability—he possessed sterling integrity. At the time when the old-time virtues of honor and honesty appeared to be so lacking in the land, he stood firm in the right, the admiration of his friends, the pride of his family. He was elected to the Senate of the Confederate Congress, and for two terms sat in the Federal Congress. Here, surrounded by temptation, in a position in which men of that period acquired immense wealth, he remained true to his office, and left the Federal Congress rich only in his record.

Again, Mr. Chairman, was he called into public service. This time a service unto death. Eight years ago he took his seat upon the bench of the Supreme Court. He was then in the full vigor of life. But the arduous labors of the Court slowly but surely undermined his health; and only a few weeks ago he yielded, not so much to the weight of years, as to the weight of labor. Notwithstanding that he sacrificed his life in the service of North Carolina, it is quite certain that the State will erect no monument to perpetuate his memory. But like the great Roman poet he has erected a monument *ære perennius*, a monument of decisions, clear and scholarly, and which will endure throughout all ages.

My acquaintance with Judge ASHE was only of recent date. But his bearing, his manners, his very words discovered to the stranger no less the virtues of the heart than the force of his mind. His private character was pure and spotless, and he

> So lived, that when his summons came to join
> The innumerable caravan which moves
> To that mysterious realm, where each shall take
> His chamber in the silent halls of death,
> * * * * *
> sustained and soothed
> By an unfaltering trust, he approached his grave
> Like one who wraps the drapery of his couch
> About him, and lies down to pleasant dreams.

REMARKS OF MR. F. D. WINSTON.

MR. CHAIRMAN: A tower has fallen from our State. "A tower that stood four square to all the winds that blew." He is gone from our midst. He leaves us the jewel of a noble life. He gave us something more precious than gold and stronger than iron; he gave us a pattern of manhood. Sir, the glory and power and wealth of a State is not in her barns, her cattle, her factories, her mines, or her cities; it is her men.

A Roman lady was exhibiting her ornaments of gold and precious stones to Cornelia, the mother of the Gracchi. Placing her hands on

the heads of her sons, afterwards the immortal champions of justice, Cornelia exclaimed, "These are my jewels!" So it has been with North Carolina, and so may it be forever. Her sons are her jewels.

Full of honors and ripe with age he has come to his grave "like as a shock of corn cometh in in his season." His youth was happy, and his old age was serene and beautiful. His manhood lasted through two generations. Rarely have we seen a nobler mind in a nobler body. Rarely has the fervid zeal of the patriot blended so harmoniously with the even conscience of the Judge. Rarely has a life dawned so fair and shone so bright and clear to its end.

My personal acquaintance with Judge ASHE was slight; but I have known him well as a great lawyer, a wise legislator, a good Judge; as

"The just and tenacious of purpose man,"
"Not the citizens' fury bidding base things,"
"Not the look of the threatening tyrant,"
"Shakes from his firm resolve."
"He—dying—leaveth as the sun of him
"A life-count closed, whose ills are dead and quit,
"Whose good is quick and mighty, far and near,
"So that fruits follow it."

But, sir, he needs no encomium. His life is his epitaph. With every act he has inscribed

"Integer vitæ scelerisque purus."

He is gone, but not in vain. We are richer for his life; we are richer for his death.

"When the mild and just die, sweet airs breathe,
The world grows richer, as if desert stream
Should sink away, to sparkle up again
Purer, with broader gleam."

Other appropriate remarks were made by Messrs. Samuel J. Pemberton and J. B. Batchelor.

The report of the committee and the resolution were unanimously adopted, and the Secretary was directed to furnish a copy of the same to the Supreme Court.

The meeting then adjourned.

IN SUPREME COURT, Feb. 18, 1887.

The Attorney-General presented the resolution and proceedings of the meeting of the Bar in memory of the late Judge ASHE, and said:

MAY IT PLEASE YOUR HONORS: I present to you and ask to have entered upon the records of this Court the proceedings of a meeting of the Bar of North Carolina, held in Raleigh on the 16th instant, to commemorate the life and services and perpetuate the memory of the late THOMAS SAMUEL ASHE, for eight years an Associate Justice of this Court, and who died at his home in Wadesboro on the 4th day of February, 1887.

I avail myself of the occasion to offer my tribute to the great worth of the good man and wise Judge who has gone from us.

His nature was singularly happily constituted. It enabled him, in all the relations of life, to instantly discern, and without parade, but quietly, steadily and faithfully to choose and pursue the right path.

Having been called upon more frequently than ordinarily falls to the lot of the citizen to discharge exalted and difficult public duties, I think it may be said no man has received or merited less criticism.

The State has lost the services of a useful citizen, but it retains and will cherish the benign influence of his life; the Bar has lost one of its most distinguished members, but it has not lost, nor will it ever lose the impression made by his elevated and stainless professional career. The Bench has lost the labors of a learned and conscientious Judge, but his "works do live after him." The surviving members of the Court, of which he was so long a part, have lost the aid of a wise associate and the pleasant companionship of a gentle and loving nature, but there remain to them the ennobling and tender memories of a long association, official and personal, marked in an unusual degree by mutual affection and respect and devotion to public duty.

The Chief Justice responded as follows:

REMARKS OF CHIEF JUSTICE SMITH.

The sentiments of the Bar conveyed in the resolution presented find a cordial response in the breasts of the members of the Court. To none outside of his near blood relatives are the virtues and worth of our deceased associate better known and appreciated than by those who were his co-laborers in the great and responsible work of ascertaining and declaring the law through the series of years that we have been together. With a common object before us and free from all swerving influences to mislead from the path of duty, a protracted and intimate intercourse has drawn very closely and strong the ties of personal regard and friendship, recognized in our forms of speech as a brotherhood—which few without experience can fully appreciate. During the eight years of our term I have learned the purity of his public and private life—the truth and sincerity of his friendship—his high sense of duty and his unselfish

devotion to its discharge. He was a learned and thorough jurist—well versed in the law—patient and careful in finding his way among its intricacies—and his conclusions, with the reasons in their support, convincing generally to the legal mind. No one more carefully considered the cases on which he undertook to draw up the opinion of the Court, nor with a more earnest desire to correctly declare the law, determining the result. Those opinions, spread over the last fifteen volumes of our reports, furnish the best evidence of his judicial ability, and are permanent memorials of the value of his public service on this bench.

But his labors have proved too severe and unremitting for his physical constitution and he has been compelled to succumb to their demand. He has passed from the investigation of the great principles of right and justice as applied to the solution of controversies among men, to their study in a grander sphere, and in their vast expansion as affecting the interests of the future life—a fit preparation, as was once said by a former member of this Court, who was called away under similar circumstances, for a translation from the present to a better life.

The Clerk will be directed to spread the resolution upon the pages of his record and the Reporter will publish the proceedings in the volume of his reports next published.

The Court then adjourned in honor of the memory of Judge ASHE.

INDEX.

ABANDONMENT:

1. Interruptions of the use of an easement when brought to the knowledge of the claimant, rebut the presumption of a grant, unless such interruptions are promptly contested by the claimant and the easement re-asserted. *Willey* v. *R. R. Co.*, 408.

2. Interruptions of the use after the lapse of the time which raises the presumption of a grant of the easement, furnish evidence of, but do not constitute of themselves an abandonment. *Ibid.*

ACCORD AND SATISFACTION:

1. If a debtor or obligor pay a less sum than is due, either before the day it is due, or for the convenience of a creditor at a place other than that named, or upon any other consideration advantageous to the creditor, or as a compromise upon an honest difference as to the amount due, it is good as an accord and satisfaction, and discharges the debt. *Grant* v. *Hughes*, 177.

2. The rule is well settled that a receipt for money does not come within the rule that parol evidence cannot be heard to vary a written contract. *Ibid.*

3. A receipt for a specific sum is not even *prima facie* evidence of an accord and satisfaction, but if the receipt expresses that it is "in full," an inference may be drawn that it is in full satisfaction. *Ibid.*

4. So where an executor of a former administrator settled with the administrator *de bonis non*, a receipt expressed to be in full of amount due to the estate is not an accord and satisfaction, and it may be shown that a larger sum was due. *Ibid.*

ACCOUNT:

1. While a defendant has the right to have a plea in bar passed on by a jury before an account is ordered, yet he may waive the right to have it passed on by a jury at all, and by consenting to a reference, he waives this right. *Grant* v. *Hughes*, 177.

2. Where an action was brought by the next of kin and heir at law, against an administrator for an account and settlement of the estate, in which a consent decree was entered, discharging the administrator of all liabilities in regard to his acts, representative or individual, in managing the estate; *It was held*, that such decree released the administrator from the trusts upon which he held certain lands, for the heirs. *Jones* v. *Slaughter*, 541.

ACTION TO RECOVER LAND:

1. The vendor of land who has not been paid, has two remedies, one *in personam* against the vendee, the other *in rem* to subject the land, and he may pursue both of these at the same time, and may also maintain an action to recover the possession. *Allen* v. *Taylor*, 37.

2. Where a vendee is let into possession before the purchase money is paid, and the vendor brings an action to recover the possession, the defendant must file the undertaking to secure rents and damages provided for by *The Code*, §237, before he will be allowed to answer. *Ibid.*

3. Where the answer does not put the plaintiff's title in issue, it is useless for him to introduce evidence of it. *Gregory* v. *Forbes*, 77.

4. Where an action was brought for a tract of land describing it as a whole, and incompetent evidence was admitted which related only to a part, the judgment of the Supreme Court will be for a *venire de novo* generally, and it will not grant a new trial only as to that portion of the land affected by the incompetent evidence. *Beam* v. *Jennings*, 82.

5. Where in an action to recover land the complaint alleged and the answer admitted that the defendant was in possession of the entire tract, but in fact the plaintiff was in possession of a portion of it, and upon a motion for a receiver the defendant was allowed to retain possession of the entire tract upon filing a bond, which was done; *It was held*, that in a proceeding to attach the plaintiff for a contempt for trespasses on that portion of which he was in possession when the order was made, it was not error to allow the order appointing the receiver to be so modified as to only embrace the land actually occupied by the defendant. *Kron* v. *Smith*, 386.

6. In such case the defendant cannot complain that the costs of the contempt proceedings are divided between the parties. *Ibid.*

7. Where land is given to a trustee to hold on various trusts, and after the death of the trustee an action is brought to construe the trusts and enforce the provisions of the deed, the Court cannot decree a conveyance of the legal estate unless all of the heirs of the trustee are parties. *Graves* v. *Trueblood*, 495.

8. One who has the right of possession of an equitable estate in land may maintain an action for the possession. *Ibid.*

9. Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action. *McNair* v. *Pope*, 502.

10. *Quære*, whether a deed executed by the executor of a deceased mortgagee, who undertook to sell the land in pursuance of the mortgage

to his testator, would establish such apparent right; but when the purchaser at such sale also sets up a release from the mortgagor, he makes out an apparent title, and is entitled to a receiver, although the release is attacked for fraud. *Ibid.*

ADMINISTRATOR:

1. A cause of action against a Clerk of the Superior Court for damages resulting from malfeasance in accepting an insufficient bond from an administrator, cannot be joined with a cause of action against such administrator and his sureties for a *devastavit*, the respective liabilities of the parties having no connection. *The Code*, §267. *Mitchell* v. *Mitchell*, 14.

2. The succession to the personal estate of a decedent is governed exclusively by the law of the actual domicil of the testator at the time of his death. *Cade* v. *Davis*, 139.

3. A creditor may sue the real representative of a deceased debtor to subject the descended lands to the payment of his debt, where there is danger of loss from delay, without waiting for the settlement of the personal estate by the administrator. *Syme* v. *Badger*, 197.

4. Under the provisions of the Act of 1715, if the debt be due at the death of the debtor an action must be brought within seven years from the death, otherwise both the heir and the executor will be discharged, and if the action arose after his death the action must be brought within seven years after the cause of action arose, or the Act will be a bar, provided the personal representative has paid over the assets. *Ibid.*

5. By the provisions of *The Code*, §153, sub sec. 2, an action is absolutely barred against both the personal representative and the heir, unless it is brought within seven years after the qualification of the personal representative and the advertisement for creditors, and nothing will defeat its operation, except the disabilities mentioned in *The Code*, or such fraud or other matter of equitable nature as would make it against conscience to rely on the statute. *Ibid.*

6. Where an action was brought in 1877 against the administrator of a deceased executrix, charging a *devastavit*, which pended until 1885, when a judgment was rendered in favor of the plaintiff, who then at once brought an action to subject the lands in hands of the heir to the payment of the judgment; *It was held*, that the action was barred. *Ibid.*

7. The administrator is not a necessary party to an action by a mortgagee to foreclose the mortgage after the death of the mortgagor. *Fraser* v. *Bean*, 327.

8. Where a vendee dies before paying in full for the land, his estate is liable for the residue, and its payment by the administrator is proper. *Jones* v. *Slaughter*, 541.

9. If, in such case, the administrator pays the balance due out of the assets of the estate, but takes the title to himself individually, the heirs can have him decreed to be a trustee for them; or, *it seems*, that they can charge him with the payment as for a *devastavit*, and have it declared a charge on the land. *Ibid.*

10. Where an action was brought by the next of kin and heir at law against an administrator for an account and settlement of the estate, in which a consent decree was entered, discharging the administrator of all liabilities in regard to his acts, representative or individual, in managing the estate; *It was held*, that such decree released the administrator from the trusts upon which he held certain lands, for the heirs. *Ibid.*

ADVERSE POSSESSION:

(See POSSESSION).

AGENT:

1. A power of attorney appointing an agent to wind up certain business of the non-resident principal, does not authorize the agent to borrow money on his account. *Smith* v. *McGregor*, 101.

2. Where prepayment of the premium is made an essential part of the contract of insurance and of the taking effect of the policy, an agent of the insurer has no power to dispense with such prepayment. *Ormond* v. *The Ins. Co.*, 158.

3. Before the acts and declarations of an alleged agent made and done in the absence of the defendant, the alleged principal, can be received in evidence, the trial Judge must find as a fact, that *prima facie* evidence of the agency has been offered, and his ruling upon this question of fact is beyond the reviewing power of the appellate Court. *Smith* v. *Kron*, 392.

4. While infants are incapable of making a contract with an agent either express or implied, so as to bind them for his torts committed in pursuance of the agency; *It seems*, that an infant is liable for torts committed by his agent in the necessary prosecution of the business of the agency, under the maxim, *qui facit per alium, facit per se*. *Ibid.*

5. Before the records and books of a corporation can be received in evidence for any purpose, it must be admitted or proved that the entries were made by an authorized servant or agent of the corporation. *Glenn* v. *Orr*, 413.

AGREEMENT OF COUNSEL:

This Court will not recognize any agreement of counsel, if disputed, unless it appears of record, or is reduced to writing and filed in the cause. *Short* v. *Sparrow*, 348.

AGRICULTURAL LIEN:

Where an instrument is intended by the parties to operate as an agricultural lien under the statute, but it fails to set out some essential matter so that it cannot take effect as such statutory lien, it will yet be given effect as a common law mortgage, if in form sufficient for that purpose. *Spivey* v. *Grant*, 214.

AMENDMENT:

1. The power of the Court to allow amendments so as to fit the complaint to the evidence is too well settled to require discussion or citation of authority. *Spivey* v. *Grant*, 214.

2. The Supreme Court has the power, in a proper case, to remand causes, to the end that proper amendments may be made, or further proceedings taken in the Court below. *Holly* v. *Holly*, 229.

3. Although a counter-claim to a counter-claim is not allowed, yet when it is pleaded at an early stage of the action, and no objection is made to it, this Court will not strike it out when the action has been long pending, but will consider it as an amendment to the complaint. *Scott* v. *Bryan*, 289.

4. Where in an action to recover land, the complaint alleged and the answer admitted that the defendant was in possession of the entire tract, but in fact the plaintiff was in possession of a portion of it, and upon a motion for a receiver the defendant was allowed to retain possession of the entire tract upon filing a bond, which was done; *It was held*, that in a proceeding to attach the plaintiff for a contempt for trespasses on that portion of which he was in possession when the order was made, it was not error to allow the order appointing the receiver to be so modified as to only embrace the land actually occupied by the defendant. *Kron* v. *Smith*, 386.

5. The distinguishing feature of the practice introduced by *The Code* is to have actions tried on their real merits, and avert a failure of justice from some defect that can be remedied by amendment, without prejudice to the other party. *Kron* v. *Smith*, 389.

6. The Superior Court has the power to allow amendments at any time, either in the allegations of the complaint or in making new parties, except where the proof establishes a case wholly different from that made in the pleadings, or where the amendment would change the subject matter of the action. *Ibid.*

7. The cause of action must exist at the time the action was begun, and the plaintiff will not be allowed by an amendment to introduce a cause of action which had no existence when the summons was issued. *Clendenin* v. *Turner*, 416.

8. The Court has no power, except by consent, to allow amendments either in respect to parties or the cause of action, which will make substantially a new action, as this would not be to allow an amendment, but to substitute a new action for the one pending. *Ibid.*

9. An amendment which introduces a cause of action which arose after the action was begun cannot be permitted. So where a submission to arbitration of the matters in controversy in a pending action was made by an agreement *in pais*, the plaintiff cannot amend his complaint so as to declare on the award which has been filed in his favor. *Jackson* v. *McLean*, 474.

10. The Courts have inherent power to allow amendments to pleadings, independent of *The Code*, which they may allow in their discretion, unless prohibited by some statute, or unless some vested right will be disturbed. *Knott* v. *Taylor*, 553.

11. Under the provisions of *The Code*, the Courts have the power, both before and after judgment, to allow amendments to the pleadings, when they do not substantially change the cause of action or defence. *Ibid.*

12. Where the cause of action set out in the complaint was to recover land descended to the plaintiff from her father, the Court has no power to allow an amendment at the trial so as to allow the plaintiff to claim a different interest as heir of her sister, as this would be not an amendment, but substantially bring a new suit. *Robbins* v. *Harris*, 557.

ANSWER:

1. Where the answer does not put the plaintiff's title in issue, it is useless for him to introduce evidence of it. *Gregory* v. *Forbes*, 77.

2. Where the answer admits the purchase of land, it is unnecessary to produce the deed, and a witness may testify to circumstances attending the transaction that are not in the deed, although he refers collaterally to the deed. *Cade* v. *Davis*, 139.

3. The lien of an attachment takes effect from its levy, and so, where in an action to compel a corporation to transfer certain stocks on its books, which the plaintiff had purchased at execution sale after it had been attached to answer the judgment, and the defendant answered that said stock had been transferred by the judgment debtor before the rendition of the judgment, but did not aver that such transfer was before the levy of the attachment; *It was held*, that the answer did not raise an issue, or set up a substantial defence. *Morehead* v. *The R. R. Co.*, 362.

4. Where the answer asks that new parties be made, this will not be done, when taking the answer as true; such party would have no ground on which to resist the plaintiff's claim. *Ibid.*

APPEAL:

1. Where, upon the trial, a party to the action was ordered to surrender the possession of a paper to the custody of the Court, and refusing, was committed for contempt, and thereupon obeyed the order and was set at liberty, but excepted and appealed; *Held*, (1) that such a refusal was a contempt; (2) that as the appeal presented only an abstract question of the power to make the order, it should be dismissed. *Thompson* v. *Onley*, 9.

2. Where a record contains superfluous matter the appellant will be taxed with the costs occasioned by it, although he succeeds in the appeal. *Tobacco Co.* v. *McElwee*, 71.

3. Where an action was brought for a tract of land describing it as a whole, and incompetent evidence was admitted which related only to a part, the judgment of the Supreme Court will be for a *venire de novo* generally, and it will not grant a new trial only as to that portion of the land affected by the incompetent evidence. *Beam* v. *Jennings*, 82.

4. Where the plaintiff does not object to the counter-claim on account of imperfect pleading, the Supreme Court, on appeal, will consider the issues which were tried on it in the Court below. *Smith* v. *McGregor*, 101.

5. *It seems* that an appeal will lie from an order of reference, where there is an undisposed of plea in bar, and the defendant objects to the reference on that ground. *Grant* v. *Hughes*, 177.

6. Where the judgment of the Superior Court, in a case remanded to it from this Court, carries out the decision rendered on the first appeal, it will be affirmed. *Ogburn* v. *Wilson*, 211.

7. When the pleadings are so confused and vague as to leave it in doubt what the parties are contending over, this Court will not take cognizance of the cause on appeal. *Woodlief* v. *Merritt*, 226.

8. Where a demurrer to a counter-claim is sustained and the counter-claim stricken out, the defendant cannot appeal from the judgment and so stop the trial of the action, but must note his exception to the action of the Court and bring the point up for review on an appeal from the final judgment. *Knott* v. *Burwell*, 272.

9. The County Commissioners are vested by the statute with the power to lay out or discontinue public roads, and from their action an appeal lies to the Superior Court in term, where the issues of fact are to be tried by a jury, and from that Court an appeal lies to the Supreme Court, as in other cases. *King* v. *Blackwell*, 322.

10. Where both parties appeal, a transcript of the record must be sent up by each appellant, and the appeals must be docketed separately, as

distinct cases. This rule cannot be waived by consent of counsel, and unless it is done the case will not be heard. *Perry* v. *Adams*, 347.

11. Where a preliminary question of fact arises, upon which the admissibility of evidence depends, the finding of the Judge cannot be reviewed on appeal, if there be any evidence to warrant it. *Smith* v. *Kron*, 392.

12. Where no errors are assigned, and none appear upon the face of the record, the judgment will be affirmed. *Justice* v. *R. R. Co.*, 412.

13. Although an appeal will not lie when the costs only are involved, yet when it calls in question the entire judgment and the costs only as incidental, it will be entertained. *Hobson* v. *Buchanan*, 444.

14. Where the case is left by consent to be tried both as to the facts and the law by the Judge, and he fails to find some material fact, it will be remanded in order that such fact may be found. *Knott* v. *Taylor*, 553.

APPEAL—ASSIGNMENT OF ERROR:

1. Where the Court below excluded a deposition, but the record did not disclose the ground of the objection, but only the fact that the deposition was excluded, this Court will not consider the exception. *Smith* v. *McGregor*, 101.

2. Where an entire deposition was objected to on the ground that the testimony contained in it was incompetent, but no particular part was pointed out, and no error assigned, the objection is too vague, and will not be considered. *Ibid.*

3. Where an appeal is taken to this Court from the action of a Judge in passing upon exceptions to the report of a referee, exceptions should be taken and stated in the record to the rulings of the Judge which it is sought to have reviewed, and the case ought not to be sent to this Court to be heard only on the exceptions taken to the ruling of the referee. *Bank* v. *M'f'g. Co.*, 298.

4. It is well settled that the omission of the trial Judge to charge the jury in a particular aspect of the case is not ground for a new trial, when the complaining party did not ask for such a charge. *King* v. *Blackwell*, 322.

5. Where a Judge at one term of the Court strikes out a judgment made at a former term and substitutes another in its stead; *It was held*, that this could not be assigned as error in the Supreme Court for the first time, there being no exception to the action of the Court entered at the time. *Cowles* v. *Curry*, 331.

6. Where an order is made recommitting a report to a referee with directions to reform it in the particulars set out in the order, to which no

exception is made, the complaining party cannot except to the report as reformed in the manner directed, and thus review the order of re-reference, but he must except to the order itself at the time it is made. *Ibid.*

7. This Court cannot consider exceptions to the findings of a referee which depend upon the evidence, when no evidence is sent up with the transcript. *Jones* v. *Call*, 337.

8. Exceptions to the Judge's charge and prayers for special instructions must be made before verdict. *Willey* v. *R. R. Co.*, 408.

9. Where the appellant excepted to the Judge's charge on the question of damages, but did not point out what he considered to be the error, and did not ask for any special instruction; *It was held*, that the judgment would be affirmed, if the charge contained no intrinsic error, although it was not as full as it might have been. *Ibid.*

10. Where no errors are assigned, and none appear upon the face of the record, the judgment will be affirmed. *Justice* v. *R. R. Co.*, 412.

11. Error cannot be assigned in this Court that the trial Judge gave the instructions asked by the appellee to the jury, when no exception thereto is made in the record. *Scott* v. *R. R. Co.*, 428.

12. The submission of an immaterial issue when not prejudicial to the appellant cannot be assigned as error. *Cuthbertson* v. *Ins. Co.*, 480.

13. Where evidence offered by the plaintiff bearing only on one issue is admitted after objection by the defendant, it cannot be assigned as error if the verdict on that issue is in favor of the defendants, although the judgment on the entire verdict is against him. *Graves* v. *Trueblood*, 495.

14. It is not erroneous for the trial Judge to reject evidence when there is no issue to which it is applicable. *Ibid.*

APPEAL—STATEMENT OF THE CASE:

A *certiorari* will not be granted to correct the statement of the case on appeal as made up by the Judge, unless it is suggested that an unintentional mistake has been made, when the case may be remanded, or a *certiorari* granted, in order to give the Judge an opportunity, if he thinks proper, to correct the case. *Mayo* v. *Leggett*, 237.

APPEAL—TRANSCRIPT:

Where both parties appeal, a transcript of the record must be sent up by each appellant, and the appeals must be dockected separately, as distinct cases. This rule cannot be waived by consent of counsel, and unless it is done the case will not be heard. *Perry* v. *Adams*, 347.

APPEAL—UNDERTAKING ON:

1. Where the undertaking on appeal for the costs and the undertaking to stay execution are in one instrument, the appellee, upon filing the proper proofs of the insolvency of the surety, is entitled to have the appeal dismissed, as prescribed by *The Code*, §554, but where the two undertakings are separate and distinct, the appellant has a right to have his appeal heard, although the surety to the undertaking to stay execution is insolvent. *Alderman* v. *Rivenbark*, 134.

2. A motion to dismiss because of imperfections in the undertaking on appeal will not be entertained, unless the provisions of ch. 121, laws 1887, are complied with. *Jones* v. *Slaughter*, 541.

APPLICATION FOR INSURANCE:

(See INSURANCE.)

ARBITRATION AND AWARD:

1. Where an agreement to submit the matters in controversy in a pending action is made out of Court, and no order of Court is made to make the award when filed a rule of Court, the Court has no power to enter a judgment on the award, but the remedy is by a new action on the award. *Jackson* v. *McLean*, 474.

2. An amendment which introduces a cause of action which arose after the action was begun cannot be permitted. So where a submission to arbitration of the matters in controversy in a pending action was made by an agreement *in pais*, the plaintiff cannot amend his complaint so as to declare on the award which has been filed in his favor. *Ibid.*

ATTACHMENT:

1. The clerk only acts ministerially in issuing the process for attachment. *Evans* v. *Etheridge*, 42.

2. A clerk of the Superior Court, upon making the necessary affidavit before some person authorized by law, may issue a warrant of attachment in an action in which he is plaintiff. *Ibid.*

3. The lien of an attachment takes effect from its levy, and so, where in an action to compel a corporation to transfer certain stocks on its books, which the plaintiff had purchased at execution sale after it had been attached to answer the judgment, and the defendant answered that said stock had been transferred by the judgment debtor before the rendition of the judgment, but did not aver that such transfer was before the levy of the attachment; *It was held*, that the answer did not raise an issue, or set up a substantial defence. *Morehead* v. *The R. R. Co.*, 362.

ATTORNEY:

1. Where a note was given to an attorney for collection, who agreed to receive one half of the amount collected for his services, but he returned the note to the executor of his client without collecting anything; *It was held*, that the attorney had never had any interest or property in the note, and was a competent witness. *White* v. *Beaman*, 122.

2. The compensation to which an attorney will be entitled for his services as counsel in collecting a note, executed before 1868, does not give him such an interest in the note as to render him an incompetent witness under §580 of *The Code*. *Grant* v. *Hughes*, 177.

BILL OF LADING:

1. The bill of lading issued by a common carrier only determines the conditions upon which the freight is to be transported after it passes under its control, and it does not abrogate or annul any contract made by the common carrier before it was issued in regard to receiving and forwarding the freight. *Hamilton* v. *R. R. Co.*, 398.

2. So where the agent of a railroad company agreed to have cars ready to receive freight and to forward it on a certain day, but the carrier failed to have the cars ready and to forward it, such contract is not abrogated by the terms of bill of lading issued when the freight was shipped on a subsequent day. *Ibid.*

BONDS:

1. The bare possession of a bond or note, unendorsed, by a stranger, does not raise a presumption that it is the property of the person having possession. *Thompson* v. *Onley*, 9.

2. To give title to a note or bond, an endorsement or assignment is not necessary. *Ibid.*

3. A written instrument whereby a party promises to pay the party therein named a sum certain at a time specified therein is a promissory note in this State, although it be under seal. *Bank* v. *Michael*, 53.

4. A bond payable to the order of the obligee, which recites the particular consideration for which it was given, as for the purchase money for a tract of land, is a negotiable instrument, and a purchaser for value, before maturity and without notice, takes it discharged of any equities between the original parties to it. *Ibid.*

5. To render a note unnegotiable, it must show on its face that the promise to pay is conditional, and renders the amount to be paid uncertain. *Ibid.*

6. The defendant executed his bond to the order of the payee, which bond recited that it was given for the purchase money for a tract of land,

and the payee endorsed it to the plaintiff before maturity. After the endorsement the obligor paid the amount due to the payee, who misapplied it; and *It was held*, that the bond was a negotiable instrument, and plaintiff being an endorsee without notice and before maturity, was entitled to recover. *Ibid.*

7. If, in such case, the bond had not been endorsed by the payee, and had been paid and discharged by the obligor before its delivery to the plaintiff, he could not have recovered. *Ibid.*

8. Where there is an inherent constitutional defect in the statute authorizing the issue of municipal bonds, a purchaser of the bonds takes them with notice of their illegal origin, for purchasers must inquire into the authority by which the bonds are issued, and are held to notice of any defect therein. *Duke* v. *Brown*, 127.

9. A majority of the qualified voters, and not merely of those voting, is necessary to enable a municipal corporation to loan its credit or contract a debt. *Ibid.*

10. Where several persons unite in executing a bond to a commission merchant for supplies to be furnished them, and one of them gives a chattel mortgage to secure the amounts advanced to him, which mortgage erroneously recites the amount of the bond, but truly specifies the amount of the advances made to the mortgagor; *It was held*, that the variance was immaterial. *Spivey* v. *Grant*, 214.

11. Where several persons unite in executing a bond, a change made by the obligee with the consent of one of them does not vitiate the bond as to him, whatever its effect may be as to the others. *Ibid.*

12. Where a mortgage is executed to secure a usurious note, the usury only affects the interest and does not impair the validity of the mortgage. *Ibid.*

13. Where the defendant executed his bond to a municipal corporation for a license tax, instead of paying cash, he is estopped from setting up as a defence that the municipal authorities had no power to take such bond and issue the license, and consequently that the bond was void. *Hendersonville* v. *Price*, 423.

BOND TO STAY EXECUTION:

(See SUPERSEDEAS BOND.)

BOUNDARY:

1. Where a devise described the devised land as containing two hundred acres, the area cannot control the boundaries by which the land is also described in the deed. *Lyon* v. *Lyon*, 439.

2. In doubtful cases the area may aid in determining the boundaries, but when it is at variance with them it must be disregarded. *Ibid.*

3. A description of land in a deed, describing it as all the interest, right, title and claim the grantors may have in the estate of the deceased father of one of them, more particularly one undivided seventh share which descended to the grantor from her father, is sufficient to admit of parol evidence to fit the description to the thing. *Robbins* v. *Harris*, 557.

BREACH OF TRUST:

Where a party unites with a trustee in a breach of trust, or there are circumstances to put him on his guard and awaken suspicion, he will be required to repay to the trust fund any of its assets which he may have received in consequence of the breach of trust. *Dancy* v. *Duncan*, 111.

BURDEN OF PROOF:

The burden of proof is on the plaintiff to show that a co-employee of a common master is a superior and not a fellow-servant, unless the nature of the employment shows the extent of the co-employee's powers. *Patton* v. *R. R. Co.*, 455.

CERTIORARI:

1. A *certiorari* will not be granted to correct the statement of the case on appeal as made up by the Judge, unless it is suggested that an unintentional mistake has been made, when the case may be remanded, or a *certiorari* granted, in order to give the Judge an opportunity, if he thinks proper, to correct the case. *Mayo* v. *Leggett*, 237.
2. Where on an application for a *certiorari* the affidavits are conflicting, this Court will not undertake to settle the disputed facts. *Short* v. *Sparrow*, 348.
3. Where an application for a *certiorari* does not assign any error in the judgment sought to be brought up for review, nor disclose any meritorious ground of appeal, the writ will be refused. *Ibid.*

CHARTER:

1. Where the charter of a corporation allowed it to borrow money on such terms as its directors might determine upon, and to issue bonds or other evidences of indebtedness; *It was held*, that this provision allowed it to sell its bonds below their face value, and where it did so, the loan was not for that reason usurious. *Bank* v. *M'f'g Co.*, 298.
2. A provision in a charter allowing a corporation to *lend* money at a usurious rate of interest, does not confer the power on them to do so, but a provision to *borrow* money at such rate is not liable to any objection. *Ibid.*

CLERK:

1. A cause of action against the clerk for malfeasance in office in accepting an insufficient bond from an administrator cannot be joined with a cause of action against such administrator and his sureties for a *devastavit*, the respective liabilities of the parties having no connection. *The Code*, §267. *Mitchell* v. *Mitchell*, 14.

2. The clerk only acts ministerially in issuing the process for attachment. *Evans* v. *Etheridge*, 42.

3. In the absence of statutory regulation, a party is only prohibited from acting in his own case when he exercises some judicial, as distinguished from a ministerial, office. *Ibid.*

4. A clerk of the Superior Court, upon making the necessary affidavit before some person authorized by law, may issue a warrant of attachment in an action in which he is plaintiff. *Ibid.*

5. It has been the practice in this State for clerks to issue process either for or against themselves. *Ibid.*

6. Where proceedings were brought before the Probate Judge which should have been brought before the Clerk, and *vice versa*, the irregularity is cured by the statute (Bat. Rev., ch. 17, §§ 425, 426). *Ward* v. *Lowndes*, 367.

7. While the assignment of dower is a Special Proceeding of which the Clerk has jurisdiction, yet if any equitable element is involved, which under the former practice would have been cognizable in a Court of equity, the Superior Court in term has jurisdiction, and the application for dower becomes a civil action. *Efland* v. *Efland*, 488.

8. Where an action was brought by a widow, alleging that the legal title to certain land was in the defendants, but that they held it in trust for her deceased husband, and asking that they be declared trustees and that her dower be assigned in the land; *It was held*, that the Superior Court in term, and not the Clerk, had jurisdiction. *Ibid.*

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CODE PRACTICE:

1. While a creditor may issue execution and sell property disposed of in fraud of creditors, this does not prevent a Court of Equity from restraining the fraudulent donee until the question of fraud can be tried, so that the property can be sold free from any cloud, and under the Code practice all this may be done in one suit. *Frank* v. *Robinson*, 28.

2. The procedure under *The Code* has not changed the legal or equitable rights of litigants, but only allows them, as they existed under the old system, to be administered in one action. *Allen* v. *Taylor*, 37.

COMMON CARRIER:

(See RAILROADS).

COMMON LAW:

The common law is presumed to exist in other States, unless it is shown to have been changed by statute. *Cade* v. *Davis*, 139.

COMPROMISE:

If a debtor or obligor pay a less sum than is due, either before the day it is due, or for the convenience of a creditor at a place other than that named, or upon any other consideration advantageous to the creditor, or as a compromise upon an honest difference as to the amount due, it is good as an accord and satisfaction, and discharges the debt. *Grant* v. *Hughes*, 177.

CONDITIONAL LIMITATION:

1. Where no members of a class to whom a conditional limitation is limited are *in esse*, a proceeding for partition to which all of the parties in interest who are *in esse* are parties will not give them a fee simple. *Overman* v. *Sims*, 451.

2. Land was conveyed to T T and his heirs, to hold for the use of M T for her life, and at her death to such child or children, and the representatives of such as she shall have by T T living at her death, and their heirs forever. M T had two children by T T living, but such children had no issue; *Held*, that M T and her children by T T could not convey a fee simple in the land, and the fact that the land had been divided by a proceeding for partition did not cure the defect. *Ibid.*

CONDITIONAL SALE:

1. Where the title to property is retained until the purchase money is paid no title to the property passes, although the description of the chattel in the instrument containing the agreement for the conditional sale is wrong. *Harris* v. *Woodard*, 232.

2. Where a party sold a mule, and retained title until the purchase money was paid, and afterwards took a mortgage on the same mule, and both in the sale note which recited that the title was retained, and in the mortgage, the mule was incorrectly described as a bay mule, when in fact it was a black one, and the mortgagor afterwards sold the mule, which was purchased from his vendee by the defendant; *It was held*, that the defendant, although acting in good faith, and in ignorance of the fact that it did not belong to his vendor, got no title. *Ibid.*

CONSIDERATION:

1. Where A is indebted to B, by notes secured by a mortgage, and C executes his notes to B in satisfaction of the debt, who delivers up A's notes and cancels the mortgage, and A executes his notes, secured by mortgage to C for the same debt; *It was held*, that the discharge of the debt by B is a sufficient consideration, and that C can collect the notes of A and foreclose the mortgage, before he has paid the debt to B. *Alderman* v. *Rivenbark*, 134.

2. The services of a child to its parent, or of a grandchild to whom the grandparent stands *in loco parentis* to such grandparent, are not gratuitous, but are presumed in the absence of evidence of an express promise, to be rendered as a recompense for the care and protection extended to the child. *Dodson* v. *McAdams*, 149.

3. If a grandparent receives his grandchild into his family as a member of it they stand in the relation of parent and child, and no presumption is raised of a promise on the part of the grandparent to pay the grandchild for services rendered such as a child generally renders as a member of the family. *Ibid.*

4. If a debtor or obligor pay a less sum than is due, either before the day it is due, or for the convenience of a creditor at a place other than that named, or upon any other consideration advantageous to the creditor, or as a compromise upon an honest difference as to the amount due, it is good as an accord and satisfaction, and discharges the debt. *Grant* v. *Hughes*, 177.

CONSTITUTIONAL LAW:

1. A contract with a railroad company to carry freight from a place within this State to a place within another State at a fixed price for the entire route, the price thus charged being greater than that required from others for same service, is not embraced by the provisions of §1966 of *The Code*. *McLean* v. *The Railroad*, 1.

2. Such a contract is also a matter affecting interstate commerce, the control of which is vested exclusively in Congress. *Ibid.*

3. A majority of the qualified voters and not merely of those voting must vote in favor of the measure in order to allow a municipal corporation to pledge its faith, loan its credit or contract any debt, under the provisions of Art. 7, §7, of the Constitution. *Southerland* v. *Goldsboro*, 49. *Duke* v. *Brown*, 127. *Markham* v. *Manning*, 132.

4. To constitute a person a qualified voter within the meaning of the Constitution, his name must be entered on the registration book. *Ibid.*

5. Only those persons whose names appear on the registration books are qualified voters, within the meaning of Art. 7, §7, of the Constitution. *Duke* v. *Brown*, 127.

6. The registration books are *prima facie* evidence of the number of qualified voters in a town, but they are open for correction on account of deaths, &c., and *perhaps* for intrinsic disqualifications and errors in admitting persons to register. *Ibid.*

7. Where there is an inherent constitutional defect in the statute authorizing the issue of municipal bonds, a purchaser of the bonds takes them with notice of their illegal origin, for purchasers must inquire

into the authority by which the bonds are issued, and are held to notice of any defect therein. *Ibid.*

8. A law which directs that the funds raised by taxation from the property of whites shall be devoted to the schools for white children, and those raised from the property of negroes shall be devoted to the schools for negroes, is unconstitutional and void. *Markham* v. *Manning*, 132.

9. Qualification is as essential as election to the right to hold office, for the right of one elected to an office to be inducted, is in subordination to the Constitution, and the officer must possess the constitutional qualifications before he can fill the office. *Hannan* v. *Grizzard*, 293.

10. The right given by the statute to a sheriff to collect the taxes for which he is accountable, after he has gone out of office, does not bring him within the inhibition of Art. 14, §7, of the Constitution, so as to render him ineligible to hold another office. *McNeill* v. *Somers*, 467.

11. Where the statute imposes certain duties to be performed by an officer after the expiration of the term of office, their performance does not constitute a place or office of trust or profit so as to disqualify the former officer from holding another office at the same time. *Ibid.*

CONSTRUCTION OF STATUTES:

As a general rule in the construction of statutes, a *proviso* will be considered as a limitation upon the general words preceding, and as excepting something therefrom, but this rule is not absolute, and the meaning of the *proviso* will be ascertained by the language used in it. *Bank* v. *M'f'g Co.*, 298.

CONTEMPT:

1. Where, upon the trial, a party to the action was ordered to surrender the possession of a paper to the custody of the Court, and refusing, was committed for contempt, and thereupon obeyed the order and was set at liberty, but excepted and appealed; *Held*, (1) that such a refusal was a contempt; (2) that as the appeal presented only an abstract question of the power to make the order, it should be dismissed. *Thompson* v. *Onley*, 9.

2. Where disobedience to an order of the Court is plainly not wilful, a disavowal of any intent to disobey will purge the contempt. *Kron* v. *Smith*, 386.

CONTINGENT REMAINDER:

1. Where no members of a class to whom a conditional limitation is limited are *in esse*, a proceeding for partition to which all of the parties in interest who are *in esse* are parties, will not give them a fee simple. *Overman* v. *Sims*, 451.

2. Land was conveyed to T T and his heirs, to hold for the use of M T for her life, and at her death to such child or children, and the representatives of such, as she shall have by T T living at her death, and their heirs forever. M T had two children by T T living, but such children had no issue; *Held*, that M T and her children by T T could not convey a fee simple in the land, and the fact that the land had been divided by a proceeding for partition did not cure the defect. *Ibid.*

CONTRACT:

1. A married woman cannot be estopped by anything in the nature of a contract. *Hodges* v. *Powell*, 64.

2. *It seems*, that when a *feme covert* has the consideration in her hands for a contract which she disaffirms, on account of her coverture, the disappointed party may recover it, and when she has converted such consideration into other property, he may follow it and subject it to the satisfaction of his demand by a proceeding *in rem*. *Ibid.*

3. If a grandparent receives his grandchild into his family as a member of it, they stand in the relation of parent and child, and no presumption is raised of a promise on the part of the grandparent to pay the grandchild for services rendered such as a child generally renders as a member of the family. *Dodson* v. *McAdams*, 149.

4. The presumption against the promise of the grandparent to pay for services in such case, may be overcome by evidence of an express promise on his part to pay for such services. *Ibid.*

5. Where the evidence was that a grandchild resided with her grandfather as a member of his family, and did household work for him, and he declared several times that he intended to give her a part of his property as he would his children, and that she should be paid for the services she rendered him; *It was held*, no sufficient evidence to go to the jury to prove a promise on the part of the grandfather to pay her for her services. *Ibid.*

6. The services of a child to its parent, or of a grandchild to whom the grandparent stands *in loco parentis* to such grandparent, are not gratuitous, but are presumed in the absence of evidence of an express promise, to be rendered as a recompense for the care and protection extended to the child. *Ibid.*

7. The bill of lading issued by a common carrier only determines the conditions upon which the freight is to be transported after it passes under its control, and it does not abrogate or annul any contract made by the common carrier before it was issued in regard to receiving and forwarding the freight. *Hamilton* v. *R. R. Co.*, 398.

8. So where the agent of a railroad company agreed to have cars ready to receive freight and to forward it on a certain day, but the carrier failed to have the cars ready and to forward it, such contract is not abrogated by the terms of bill of lading issued when the freight was shipped on a subsequent day. *Ibid.*

9. Although a contract be invalid at the time of its execution, yet if the parties to it go on and treat it as valid, they will be estopped to deny its validity, provided they are *sui juris*, and that the invalidity of the contract does not arise from some illegality. *Hendersonville* v. *Price*, 423.

10. The application for insuraace forms a part of the contract, and the inquiry and answers are tantamount to an agreement that the matter enquired about is material, and its materiality is not open to be tried by the jury. *Cuthbertson* v. *Ins. Co.*, 480.

11. In the absence of fraud or mistake, a party will not be heard to say that he was ignorant of the contents of a writing signed by him, containing a contract on his part. *Ibid.*

12. So where a party signed an application for insurance which contained a warranty that the property belonged to the applicant in fee, and that there were no liens on it, he will not be allowed to testify that he did not know that such a fact was stated in the application. *Ibid.*

13. Where several distinct kinds of property are insured in the same policy, and there is a false statement in the application as to some of it, it avoids the policy as to all, as the policy is one entire and indivisible contract. *Ibid.*

14. Where a variance is not merely formal, but lies at the very root of the cause of action, it is fatal to the plaintiff's right to recover. *Pendleton* v. *Dalton*, 507.

15. So where a suit was brought on a contract alleged to have been made with a decedent, and for the benefit of his estate, but the evidence showed that he was not a party to the contract in its origin, nor did he ever acquire an interest in it by assignment, the variance was fatal, and the plaintiff was properly nonsuited. *Ibid.*

16. Where a vendee dies before paying in full for the land, his estate is liable for the residue, and its payment by the administrator is proper. *Jones* v. *Slaughter*, 541.

CONTRACT TO PURCHASE LAND:

1. One let into possession of land under a contract to purchase, is an occupant at the will of the vendor, and he so continues until the purchase money is paid. *Allen* v. *Taylor*, 37.

2. In such case, the vendor may, after reasonable notice to quit, demand possession, and if the possession is not surrendered, he may bring his action at once. *Ibid.*

3. What is reasonable notice to quit will depend on the circumstances of each case. *Ibid.*

4. While a Court of Equity will hold a vendor who has received the full price for land as a trustee for the vendee, and compel him to convey the legal title, yet before the purchase money is paid, it will not deprive him of any of his rights, legal or equitable, and one of these is the right to hold possession of the land, in the absence of a stipulation to the contrary in the contract. *Ibid.*

5. A vendee failing to pay the purchase money has no right to have the land sold as of course, and a Court of Equity will not direct a sale at his instance, unless it appears that the land will sell for a sum sufficient to pay the debt, and that he is unable to pay it without a sale. *Ibid.*

6. The vendor of land who has not been paid, has two remedies, one *in personam* against the vendee, the other *in rem* to subject the land, and he may pursue both of these at the same time, and may also maintain an action to recover the possession. *Ibid.*

7. Where a vendee is let into possession before the purchase money is paid, and the vendor brings an action to recover the possession, the defendant must file the undertaking to secure rents and damages provided for by *The Code*, §237, before he will be allowed to answer. *Ibid.*

8. Where a parol contract for the sale of land upon which money has been paid, is repudiated, the vendor is required to return the money, for he will not be allowed to retain both the money and the land. *Cade* v. *Davis*, 139.

9. Where a vendee dies before paying in full for the land, his estate is liable for the residue, and its payment by the administrator is proper. *Jones* v. *Slaughter*, 541.

10. If, in such case, the administrator pays the balance due out of the assets of the estate, but takes the title to himself individually, the heirs can have him decreed to be a trustee for them; or, *it seems*, that they can charge him with the payment as for a *devastavit*, and have it declared a charge on the land. *Ibid.*

CONTRIBUTION:

1. Where four copartners joined in a note to purchase property for the partnership account, and after the dissolution of the firm, the plaintiff paid more than his proportion of the note, and brought suit against the defendant for contribution; *It was held*, that the other partners were not necessary parties where they were all insolvent, one of them

dead with no representation, and another a non-resident of the State. *Scott* v. *Bryan*, 289.

2. Where one partner pays more than his share towards a partnership debt, he can only recover from his copartner one half of the excess paid. *Ibid.*

CONTRIBUTORY NEGLIGENCE:

1. Where a party is injured by the want of ordinary care and diligence in another, but the party injured does not use reasonable care and diligence himself, he cannot recover. *Walker* v. *Reidsville*, 382.

2. If the injured party, although not entirely free from fault, could not by ordinary care and prudence have avoided the danger caused by the careless and negligent conduct of the defendant, he can recover damages for the injury. *Ibid.*

3. So, if the negligence of the defendant was the immediate cause of the injury, and that of the plaintiff was remote, such remote contributory negligence would not bar a recovery. *Ibid.*

4. Where an excavation was allowed to remain open and unguarded in a town, which, however, was some distance from the sidewalk, and its existence and unprotected condition was well known to the plaintiff, who carelessly fell into it and was injured; *It was held*, that he could not recover. *Ibid.*

5. In an action for damages for an injury caused by the negligence of the defendant, where the defence is contributory negligence, it is sometimes proper to submit two issues, one as to the negligence of the defendant, and the other as to the contributory negligence of the plaintiff, yet when the action of both has contributed to the injury, it is allowable to submit an issue only as to the defendant's negligence, with instructions to find that in the negative, if the jury believe that the plaintiff's conduct contributed to the injury. *Scott* v. *R. R. Co.*, 428.

6. It is not *per se* negligence for the plaintiff to have driven his vehicle near one edge of a street approaching a railroad, although he could have obtained a better view of the track from the middle of the street. *Ibid.*

7. It is not error for the trial Judge to refuse to charge that certain acts or omissions of the plaintiff amount to contributory negligence when the evidence in regard to them is conflicting. *Ibid.*

8. Where the plaintiff was injured at a point where the railroad track crossed the street it is not *per se* negligence that he might have seen the moving cars at another crossing, where there were several tracks,

and the evidence was conflicting as to whether he could have discovered that the cars were on the track which led to the crossing which he was approaching. *Ibid.*

9. One who is injured by jumping from a moving train is generally barred of a recovery by reason of his contributory negligence, but where a servant was ordered by his superior to do so in order to perform a duty for the company, it not appearing to the servant at the time that obedience would certainly cause injury; *It was held*, that there was no such contributory negligence as would prevent a recovery. *Patton* v. *R. R. Co.*, 455.

CONTROVERSY WITHOUT ACTION:

In the submission of a controversy without action, the statement of facts upon which the judgment of the Court is asked should not be a mere narration of the facts out of which the controversy arises, but should contain a statement of the subject-matter and nature of the controversy and of the conflicting claims of the litigants. *Overman* v. *Sims*, 451.

CONVERSION:

1. Conversion consists either in the appropriation of the thing to the party's own use; or in its destruction; or in exercising dominion over it in exclusion or defiance of the plaintiff's rights; or in withholding the possession from the plaintiff, under a claim of title, inconsistent with that of the plaintiff, but it must be by *acts*, as bare words will not amount to a conversion. *University* v. *The Bank*, 280.

2. In the case of a conversion by a wrongful taking of the chattel it is not necessary to prove a demand and refusal; and so the wrongful assumption of the property and of the right of disposing of it may be a conversion in itself, and render a demand and refusal unnecessary. *Ibid.*

3. The statute of limitations will run in favor of one who has converted chattels and applied them to his own use, although the true owner may be ignorant of the conversion. *Ibid.*

4. Public securities, such as State bonds, may be converted by returning them under an assertion of a right to hold them in defiance of the true owner, as well as other property. *Ibid.*

CONVEYANCE:

(See DEED.)

CORPORATION:

1. Where the charter of a corporation allowed it to borrow money on such terms as its directors might determine upon, and to issue bonds or other evidences of indebtedness; *It was held*, that this provision al-

lowed it to sell its bonds below their face value, and where it did so the loan was not for that reason usurious. *Bank* v. *M'f'g Co.*, 298.

2. A provision in a charter allowing a corporation to *lend* money at a usurious rate of interest does not confer the power on them to do so, but a provision to *borrow* money at such rate is not liable to any objection. *Ibid.*

3. Two corporations were under the same management, and one of them executed a mortgage on its property to secure a debt, and afterwards this debt was assumed by the other corporation, which executed a mortgage on its property to secure it, and the mortgage on the property of the original debtor corporation was cancelled. After the expiration of some time, the original debtor corporation again assumed the payment of this debt, executed a new mortgage to secure it, and the mortgage on the second corporation was cancelled; *It was held*, that under the provisions of our registration laws, as against creditors, the cancelled mortgages were inoperative, and the secured creditor could claim no liens or priorities under them. *Ibid.*

4. The provisions of Bat. Rev., ch. 25, §48, (*The Code*, §685,) apply to corporations generally, and are not restricted to those only formed by foreclosures under a deed of trust of an insolvent or expiring corporation. *Ibid.*

5. So, where a corporation made a mortgage for the purpose of securing bonds to raise money; *It was held*, that the debts owing by such corporation at the time the mortgage was executed were entitled to priority over the bonds secured by the mortgage. *Ibid.*

6. The act of 1879, which provides that mortgages executed by corporations on their property or earnings shall not exempt the property or earnings from execution for the satisfaction of a judgment obtained for labor performed, materials furnished, or for torts committed by such corporation, so far as it relates to labor and materials furnished, is only intended to more effectually secure the lien given by the Constitution and statutes to laborers and material-men, and was not intended to create a lien in favor of parties who furnish machinery, &c., to the corporation upon its personal credit. *Ibid.*

7. *It is intimated*, that the purchaser of shares of an incorporated company, at a sale under an attachment against the party who appears on the stock-book of the corporation to be the owner, gets a title superior to that of a transferee from such apparent owner, who has not had the transfer made on the books of the corporation. *Morehead* v. *The R. R. Co.*, 362.

8. Before the records and books of a corporation can be received in evidence for any purpose, it must be admitted or proved that the entries

were made by an authorized servant or agent of the corporation. *Glenn* v. *Orr*, 413.

9. The records and books of a corporation are at the least *prima facie* evidence of the organization and existence of the corporation. *Ibid.*

10. Where the stock-book of a corporation contained a list of the stockholders, the number of shares of stock owned by each, the sum of money paid by each, and the balance due, such book is evidence against a stockholder in an action to recover the unpaid balance of his subscription, to show that he was a stockholder, and the condition of his stock account, but such evidence may be rebutted. *Ibid.*

COSTS:

1. Where a record contains superfluous matter the appellant will be taxed with the costs occasioned by it, although he succeeds in the appeal. *Tobacco Co.* v. *McElwee*, 71.

2. Where in an action to recover land the complaint alleged and the answer admitted that the defendant was in possession of the entire tract, but in fact the plaintiff was in possession of a portion of it, and upon a motion for a receiver the defendant was allowed to retain possession of the entire tract upon filing a bond, which was done; *It was held*, that in a proceeding to attach the plaintiff for a contempt for trespasses on that portion of which he was in possession when the order was made, it was not error to allow the order appointing the receiver to be so modified as to only embrace the land actually occupied by the defendant. *Kron* v. *Smith*, 386.

3. In such case the defendant cannot complain that the costs of the contempt proceedings are divided between the parties. *Ibid.*

4. A vendee is not entitled to recover costs in an action to force him to perform his contract and pay for the land, if he contest the case and does not make a deposit of the amount due, although the plaintiff cannot make a good title at the time when the action is commenced. *Hobson* v. *Buchanan*, 444.

5. *It is intimated*, that the vendee could recover his costs in such case if he made deposit of the balance due and accepted the title as soon as the vendor had perfected it. *Ibid.*

6. Although an appeal will not lie when the costs only are involved, yet when it calls in question the entire judgment and the costs only as incidental, it will be entertained. *Ibid.*

COUNTER-CLAIM:

1. A counter-claim which only alleges that the plaintiff is indebted to the defendant, without alleging further the nature and kind of such indebtedness, and how it arose, is imperfectly pleaded, and ought to be

disregarded, and in such case a bill of particulars affixed to the pleadings as a part of it does not aid it. *Smith* v. *McGregor*, 101.

2. Where, in such case, the plaintiff does not object to the counter-claim on account of the imperfect pleading, the Supreme Court, on appeal, will consider the issues which were tried on it in the Court below. *Ibid.*

3. Where the answer alleged as a counter-claim that the note sued on was endorsed to the plaintiff after maturity, and that the endorser was indebted to the defendant before the transfer of the note for money paid by him as his surety, and the evidence offered to support it was a joint and several note, executed by the defendant and another party, who it was alleged, was the agent of the endorser of the plaintiff, but nothing in the note offered in evidence showed any agency; *It was held*, a failure of proof, and the Court below properly charged the jury that there was no evidence to support the allegation ot the counter-claim. *Ibid.*

4. Where a demurrer to a counter-claim is sustained and the counter-claim stricken out, the defendant cannot appeal from the judgment and so stop the trial of the action, but must note his exception to the action of the Court and bring the point up for review on an appeal from the final judgment. *Knott* v. *Burwell*, 272.

5. Although a counter-claim to a counter-claim is not allowed, yet when it is pleaded at an early stage of the action, and no objection is made to it, this Court will not strike it out when the action has been long pending, but will consider it as an amendment to the complaint. *Scott* v. *Bryan*, 289.

COUNTY COMMISSIONERS:

1. The result of the vote is conclusively settled, so far as the Board of County Commissioners are concerned, by the certificate of the Board of Canvassers. *Hannon* v. *Grizzard*, 293.

2. It is reasonable to presume, and to act upon the presumption, that a person chosen by the electors is qualified to hold the office, but if the Commissioners are satisfied, or have reasonable grounds to believe, that the person elected is disqualified by the Constitution from holding the office, they are not required to induct him. *Ibid.*

3. So where a person was elected to an office, but the Commissioners, acting in entire good faith, refused to induct him, on the ground that he was disqualified under the Constitution from holding the office, but upon a suit instituted to try the title to the office it was adjudged that he was qualified; *It was held*, that an action would not lie against the Commissioners to recover damages for the profits of the office lost by their refusal to induct. *Ibid.*

4. If the action of the Commissioners in such case had been prompted by malice, or to accomplish any unlawful end, the action would lie. *Ibid.*

5. The County Commissioners are vested by the statute with the power to lay out or discontinue public roads, and from their action an appeal lies to the Superior Court in term, where the issues of fact are to be tried by a jury, and from that Court an appeal lies to the Supreme Court, as in other cases. *King* v. *Blackwell*, 322.

6. Whether the duty of the County Commissioners of inducting persons who have received a certificate of election into office is merely ministerial or not; *Quære*, but if the commissioners refuse to induct one who is plainly ineligible, the Courts will not compel them to do so, and thus put one into an office which he cannot constitutionally hold. *McNeill* v. *Somers*, 467.

COVERTURE:

(See MARRIED WOMEN.)

CURTESY:

An estate settled on a *feme covert* for life, with a power of appointment at her death in fee, does not give her such an estate as will entitle the husband to curtesy if she fails to appoint. *Graves* v. *Trueblood*, 495.

DAMAGES:

1. In action to recover damages for a libel it is competent for the defendant to introduce evidence in mitigation of damages, to show the provocation which induced him to publish the libel, but this provocation must originate in the same subject-matter out of which the libel arose, or be closely connected with it. *Knott* v. *Burwell*, 272.

2. In actions for defamation under the former system of pleading, evidence offered to sustain a plea of the general issue could not be considered in mitigation of damages, but this has been changed by *The Code*, §266. *Ibid.*

3. Malice is presumed from the utterance of false defamatory words, and proof of it, other than proof of the utterance of the false and defamatory words, is not necessary, and hence it is always proper to allow the defendant to prove an absence of malice in order to mitigate the damages. *Ibid.*

4. So where the plaintiff had charged the defendant with using false weights in his business, and upon hearing of the charge the defendant sent to the plaintiff and asked him to correct the charge, which the plaintiff promised to do, admitting at the time that the charge was false, but he afterwards refused to retract it, upon which refusal the defendant published the libel sued on; *It was held*, that these facts were admissible in evidence in mitigation of damages. *Ibid.*

5. Where the plaintiff's business has been broken up by the wrongful act of the defendant, he can recover in damages the profits on contracts which were actually made, and which he was prevented from completing by such wrongful act, but he cannot recover the possible profits which his business would have yielded if not interfered with, as this damage is speculative and remote. *Jones* v. *Call*, 337.

6. So where the plaintiff was a manufacturer of patent tobacco machines and was stopped from such manufacture by the wrongful act of the defendant, and at the time of such stoppage the plaintiff had contracts for machines which would have yielded a profit of $1,700, and the referee found that the business which was broken up was worth $6,000 a year; *It was held*, that the measure of damages was the profit on the machines contracted for, and the estimated profit of the business was too speculative and remote to constitute the measure of damages. *Ibid.*

7. Where the carrier is informed of the special circumstances making it advantageous to the plaintiff to get his produce to a certain market on a certain day, and agrees to furnish cars to be loaded in time to be forwarded to such market by that day, which contract he fails to perform, the plaintiff is entitled to recover such special damages as actually result from a failure to get the produce to the market on that day. *Hamilton* v. *R. R. Co.*, 398.

DECLARATIONS:

1. Statements in regard to the rights of a party made in his presence, and not denied or explained by him, are evidence against him, but this evidence should never be received unless it be of declarations of that kind which naturally call for a denial or explanation, and they must be made on an occasion when a denial might properly be expected. *Tobacco Co.* v. *McElwee*, 71.

2. Where a witness was examined before a commissioner, in another suit, in which the defendant in the present action was a party and also a witness, and during such examination the witness made statements in the presence of the defendant derogatory to his rights in this action, which were not denied at the time they were made, nor did the defendant contradict them on his examination in that action; *It was held*, that the occasion was one where it would have been improper for the defendant to have contradicted the witness, and that such declarations were not evidence in this action. *Ibid.*

DECREE:

A decree does not operate as a conveyance, unless it complies with the requirements of the statute (*The Code*, §427), by declaring "that it shall be regarded as a deed of conveyance," &c. *Morris* v. *White*, 91.

DEED:

1. While a wife may execute a power of appointment conferred upon her in favor of her husband, yet she cannot convey her land directly to him, except as allowed by *The Code*, §§1835, 1836. *Sims* v. *Ray*, 87.

2. A decree does not operate as a conveyance, unless it complies with the requirements of the statute (*The Code*, §427), by declaring "that it shall be regarded as a deed of conveyance," &c. *Morris* v. *White*, 91.

3. The Court will always give such interpretation to the words of a deed as will effectuate its purpose, if the words in any reasonable view will admit of it. *Hicks* v. *Bullock*, 164.

4. Where the words of inheritance only appear in one part of the deed but the entire language is inartificial and badly expressed, but it appears from the entire instrument that it was the intention of the parties to pass the fee, the Court will construe the deed so as to pass the fee. *Ibid.*

5. In an action to reform a deed, the evidence of the party asking the reformation, as to the object of purchasing the land, the directions given to the draughtsman, &c., is not sufficient to warrant a verdict upon which the Court would decree a reformation of the deed. *Graves* v. *Trueblood*, 495.

6. The privy examination of a *feme covert* which sets out that she signed the deed of her own free will and accord, and without any compulsion of her husband, is sufficient, without adding the words, "and doth voluntarily assent thereto." *Robbins* v. *Harris*, 557.

7. Where, under the old system, it appeared that an order was made appointing a justice of the peace to take a privy examination, it will be presumed that the justice was a member of the County Court appointed for that purpose. *Ibid.*

8. A description of land in a deed, describing it as all the interest, right, title and claim the grantors may have in the estate of the deceased father of one of them, more particularly one undivided seventh share which descended to the grantor from her father, is sufficient to admit of parol evidence to fit the description to the thing, *Ibid.*

DELIVERY:

1. In order to perfect a gift of personal property there must be an actual delivery, if the nature of the property will admit of an actual delivery, and if not, then some act must be done equivalent to actual delivery; and which will have the effect to pass the title to it. *Medlock* v. *Powell*, 499.

2. So where a father said to his son that he might have a certain colt, if he would raise it, and there was other evidence tending to show that

the father intended that the son should have the colt, but there was no evidence to show a delivery; *It was held*, that the property did not pass, and the colt belonged to the father. *Ibid.*

DEMAND:

In the case of a conversion by a wrongful taking of the chattel it is not necessary to prove a demand and refusal; and so the wrongful assumption of the property and of the right of disposing of it, may be a conversion in itself, and render a demand and refusal unnecessary. *University* v. *The Bank*, 280.

DEMURRER:

Where a demurrer to a counter-claim is sustained and the counter-claim stricken out, the defendant cannot appeal from the judgment and so stop the trial of the action, but must note his exception to the action of the Court and bring the point up for review on an appeal from the final judgment. *Knott* v. *Burwell*, 272.

DEPOSITION:

1. Where the Court below excluded a deposition, but the record did not disclose the ground of the objection, but only the fact that the deposition was excluded, this Court will not consider the exception. *Smith* v. *McGregor*, 101.

2. Where an entire deposition was objected to on the ground that the testimony contained in it was incompetent, but no particular part was pointed out, and no error assigned, the objection is too vague, and will not be considered. *Ibid.*

DESCENDED LAND:

1. Creditors of a deceased person have no lien upon his lands, but only the right to have them subjected to the payment of the debts if there shall be a deficiency of the personal assets, and consequently a conveyance made by the heir or devisee within two years after the grant of administration and advertisement for creditors, is not absolutely void, but only subject to be annulled by the contingency of the personal assets proving insufficient. *Davis* v. *Perry*, 260.

2. Where a purchaser bought land from a devisee within the two years, and after the death of the purchaser his administrator sold the land to make assets, more than two years after the issuing of letters, &c., upon the estate of the devisor; *It was held*, that a purchaser at the sale to make assets got a good title as against the creditors of the devisor. *Ibid.*

3. In such case, the administrator of the purchaser will hold the money received from the sale of the land in *lieu* thereof, and subject to the claims of the creditors of the devisor. *Ibid.*

4. Where a devisee or heir at law sells land derived from the devisor or ancestor more than two years after the issuing of letters testamentary, &c., to a *bona fide* purchaser for value and without notice, such purchaser gets a good title against the creditors of the devisor or ancestor, but the devisee or heir holds the price received for the land in *lieu* thereof, and subject to the claims of such creditors, just as the land would have been. *Ibid.*

5. A purchaser from an heir or devisee with notice, although after two years, holds the land subject to the claims of the creditors of the devisor or ancestor. *Ibid.*

DESCRIPTION OF LAND IN A DEED:

(See BOUNDARY.)

DEVASTAVIT:

1. When an action is brought against an executor or administrator for a *devastavit*, and a judgment is obtained against him, the cause of action accrues at the time of the qualification, and the law in force at the time governs, but when the action is brought after the death of the executor, the cause of action accrues as against his real and personal representative when such representative qualifies and gives notice to creditors. *Syme* v. *Badger*, 197.

2. Where an action was brought in 1877 against the administrator of a deceased executrix, charging a *devastavit*, which pended until 1885, when a judgment was rendered in favor of the plaintiff, who then at once brought an action to subject the lands in hands of the heir to the payment of the judgment; *It was held*, that the action was barred. *Ibid.*

3. If the administrator pays the balance due out of the assets of the estate, but takes the title to himself individually, the heirs can have him decreed to be a trustee for them; or, *it seems*, that they can charge him with the payment as for a *devastavit*, and have it declared a charge on the land. *Jones* v. *Slaughter*, 541.

DEVISE:

Courts of equity will not entertain a suit for the construction of a devise, but will leave the devisee to assert his right at law, in an action to recover the land. *Woodlief* v. *Merritt*, 226.

DISTRIBUTION:

The succession to personal property is governed exclusively by the law of the actual domicil of the intestate at the time of his death. *Cade* v. *Davis*, 139.

DOMICIL:

The succession to personal property is governed exclusively by the law of the actual domicil of the intestate at the time of his death. *Cade* v. *Davis*, 139.

DOWER:

1. Where a husband and wife joined in a bond to convey a tract of land to the defendant, but the wife was not privily examined, and after the death of the husband she received payment for the land and invested the money in other land; *It was held*, that she was estopped from taking advantage of the want of a privy examination, and therefore was not entitled to dower in the land sold by her husband. *Hodges* v. *Powell*, 64.

2. While the assignment of dower is a Special Proceeding of which the Clerk has jurisdiction, yet if any equitable element is involved, which under the former practice would have been cognizable in a Court of equity, the Superior Court in term has jurisdiction, and the application for dower becomes a civil action. *Efland* v. *Efland*, 488.

3. Where an action was brought by a widow, alleging that the legal title to certain land was in the defendants, but that they held it in trust for her deceased husband, and asking that they be declared trustees and that her dower be assigned in the land; *It was held*, that the Superior Court in term, and not the Clerk, had jurisdiction. *Ibid.*

4. A widow is not entitled to dower in an equity unless the husband had such an equitable estate as could be enforced in a Court of equity. *Ibid.*

5. Possession alone does not constitute such a seizin as is necessary to support a claim for dower. *Ibid.*

6. Where land was purchased and paid for by the husband, but the deed was made to a third party in order to defraud the creditors of the husband, he has no such seizin as will support a claim for dower on the part of his widow, although he was in possession of the land; but where land of which the husband was seized during coverture was sold at execution sale, and purchased by a third party with the money of the husband, and the title was made to the purchaser, with a like intent to defraud, the wife is entitled to dower. *Ibid.*

DRAINING LAND:

1. In an action against the defendant for flooding the plaintiff's land, evidence is admissible to show that the plaintiff knew that the defendant claimed the right to drain his land through that of the plaintiff before he purchasad it. *Hair* v. *Downing*, 172.

2. Where a party has the right to use a ditch to drain his land, he has the right to keep it open and clear from obstructions. *Ibid.*

3. Where a man owns two tenements, the one dominant and the other servient, and sells them both to different parties, the easement passes with the legal estate of the tract to which it belongs, and the grantee of the servient tenement takes it subject to the easement. *Ibid.*

EASEMENT:

1. In an action against the defendant for flooding the plaintiff's land, evidence is admissible to show that the plaintiff knew that the defendant claimed the right to drain his land through that of the plaintiff before he purchased it. *Hair* v. *Downing*, 172.

2. Where a party has the right to use a ditch to drain his land, he has the right to keep it open and clear from obstructions. *Ibid.*

3. Where a man owns two tenements, the one dominant and the other servient, and sells them both to different parties, the easement passes with the legal estate of the tract to which it belongs, and the grantee of the servient tenement takes it subject to the easement. *Ibid.*

4. The continuous use of a road as of right for the prescribed time is evidence of the acquirement of the easement, and in the absence of other evidence it is conclusive. *Willey* v. *R. R. Co.*, 408.

5. Interruptions of the use of an easement when brought to the knowledge of the claimant, rebut the presumption of a grant, unless such interruptions are promptly contested by the claimant and the easement reasserted. *Ibid.*

6. Interruptions of the use after the lapse of the time which raises the presumption of a grant of the easement, furnish evidence of, but do not constitute of themselves, an abandonment. *Ibid.*

7. As the presumption of a grant will arise by an adversary and continuous use of an easement for twenty years, so a disuse occurring afterwards for the same length of time will raise a presumption of a surrender or extinction of the easement in favor of the servient tenement. *Ibid.*

8. Where the plaintiff had a right to use a road which ran over the right of way of a railroad corporation, the corporation has no right to obstruct such road, when such obstructions were not necessary for purposes of the corporation. *Ibid.*

ELECTION:

1. A majority of the qualified voters, and not merely of those voting, must vote in favor of the measure in order to allow a municipal corporation to pledge its faith, loan its credit or contract any debt, under the provisions of Art. 7, §7, of the Constitution. *Southerland* v. *Goldsboro*, 49. *Duke* v. *Brown*, 127.

2. To constitute a person a qualified voter within the meaning of the Constitution, his name must be entered on the registration book. *Ibid.*

3. The registration books are *prima facie* evidence of the number of qualified voters in a town, but they are open for correction on account of deaths, &c., and *perhaps* for intrinsic disqualifications and errors in admitting persons to register. *Duke* v. *Brown*, 127.

4. Qualification is as essential as election to the right to hold office, for the right of one elected to an office to be inducted, is in subordination to the Constitution, and the officer must possess the constitutional qualifications before he can fill the office. *Hannan* v. *Grizzard*, 293.

5. The result of the vote is conclusively settled, so far as the Board of County Commissioners are concerned, by the certificate of the Board of Canvassers. *Ibid.*

6. It is reasonable to presume, and to act upon the presumption, that a person chosen by the electors is qualified to hold the office, but if the Commissioners are satisfied, or have reasonable grounds to believe, that the person elected is disqualified by the Constitution from holding the office, they are not required to induct him. *Ibid.*

7. Whether the duty of the County Commissioners of inducting persons who have received a certificate of election into office, is merely ministerial or not; *Quære*, but if the commissioners refuse to induct one who is plainly ineligible, the Courts will not compel them to do so, and thus put one into an office which he cannot constitutionally hold. *McNeill* v. *Somers*, 467.

8. The ruling heretofore made in *Southerland* v. *Goldsboro*, ante, 49, and *Duke* v. *Brown*, ante, 127, in regard to the meaning of the term "qualified voters," as used in Art. 7, §7, of the Constitution, affirmed. *McDowell* v. *The Cons. Co.*, 514.

9. Before an election is held, opportunity must be given to all persons entitled to become qualified voters to register, and if this opportunity is denied, either purposely or by accident, it may vitiate the election, and will certainly do so, if such denial should materially affect the result. *Ibid.*

10. When the County Commissioners ascertain and declare the result of an election, their action and declaration cannot be attacked collaterally, but it may be by a direct proceeding for that purpose. *Ibid.*

11. Where it is sought to directly attack and have declared void the action of the Commissioners in declaring the result of an election, the action need not be brought until some action is proposed to be taken under the alleged election. *Ibid.*

12. So, where an election was held in 1883, for the purpose of obtaining authority to issue bonds in aid of a railroad corporation, which the

Commissioners declared to have been ratified by a majority of the qualified voters, but it was not attempted to issue the bonds until 1886; *It was held*, that an action brought to attack the finding of the Commissioners when they attempted to issue the bonds, was not barred. *Ibid.*

13. In an action brought to have an election to ratify the issue of bonds to a railroad corporation declared void, and to restrain the issuing of the bonds, it was made *prima facie* at least, to appear, that the election was not called in accordance with law; that no notice of the election was given; that no opportunity was given for registration to such persons as had become qualified since the last election; that as a matter of fact, a majority of the qualified voters did not vote for the measure, and that there were various other grave irregularities; *It was held*, that an injunction until the hearing should be granted, to restrain all action under and in pursuance of the election. *Ibid.*

14. Where in such case it was made to appear that since the appeal was taken, the bonds had been delivered; *It was held*, that it was immaterial. *Ibid.*

15. The validity or invalidity of an election may be tested by an action, although it is alleged that innocent persons have acquired rights under the election as declared by the proper authorities. Such alleged innocent parties, although parties to the action, are not precluded by a judgment declaring the election void, but their rights must be tested by actions prosecuted for that purpose. *Goforth* v. *Cons. Co.*, 535.

16. Where the question of subscription to two different railway corporations is to be submitted to a vote, it is improper and irregular to submit them as a single proposition, at the same election and on the same ballot. *Ibid.*

ENDORSEMENT:

1. The bare possession of a bond or note, unendorsed, by a stranger, does not raise a presumption that it is the property of the person having possession. *Thompson* v. *Onley*, 9.

2. To give title to a note or bond, an endorsement or assignment is not necessary. *Ibid.*

3. The defendant executed his bond to the order of the payee, which bond recited that it was given for the purchase money for a tract of land, and the payee endorsed it to the plaintiff before maturity. After the endorsement the obligor paid the amount due to the payee, who misapplied it; and *It was held*, that the bond was a negotiable instrument, and plaintiff being an endorsee without notice and before maturity, was entitled to recover. *Bank* v. *Michael*, 53.

4. If, in such case, the bond had not been endorsed by the payee, and had been paid and discharged by the obligor before its delivery to the plaintiff, he could not have recovered. *Ibid.*

ENTRY AND GRANT:

1. An entry-taker has no authority to act upon the application of a claimant for lands not situated in his county, and an entry of such application on his records would be void. *Harris* v. *Norman*, 59.

2. The entry, the copy thereof, the warrant for a survey, the survey and the plats constitute the essential groundwork of the grant, and in their absence there is no authority to issue the grant. *Ibid.*

3. Where all the proceedings preliminary to the issuing of the grant described the land as lying in one county, and the land was described in the grant as lying in that county, but as a matter of fact it was situated in another county, the grant is void. *Ibid.*

4. Where the invalidity of a grant appears on its face it is not necessary to attack it by a direct proceeding, but it may be taken advantage of whenever offered in evidence. *Ibid.*

5. The provisions of *The Code*, §2784, only extend to cases where the entry of land lying partly in two counties, which is unknown to the grantee, is made only in one county. In such cases the statute cures the defect. *Ibid.*

6. The State can only grant land under navigable water for wharf purposes, and county commissioners have no power to confer upon a party a right to build a wharf upon such land for the purpose of a public road. *Gregory* v. *Forbes*, 77.

7. The riparian owner of land has the right, under our entry laws, to enter the water front up to deep water, for the purpose of erecting a wharf, and in such case the title to the land passes. *Ibid.*

ENTRY TAKER:

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EQUITABLE ISSUES:

1. Where a party claims under a lost deed he must show by clear and full evidence that such a deed once existed, its legal operation, and its loss. *Loftin* v. *Loftin*, 94.

2. Under the present practice, where a party claims under a lost deed it is not error for the trial Judge to charge the jury that the lost deed could only be established by clear and satisfactory proof. *Ibid.*

3. In an action to reform a deed, the evidence of the party asking the reformation, as to the object of purchasing the land, the directions given to the draughtsman, &c., is not sufficient to warrant a verdict upon which the Court would decree a reformation of the deed. *Graves* v. *Trueblood*, 495.

ESTOPPEL:

1. A married woman cannot be estopped by anything in the nature of contract, but where it would amount to a fraud to allow her to repudiate her acts she is estopped. *Hodges* v. *Powell*, 64.

2. Where a husband and wife joined in a bond to convey a tract of land to the defendant, but the wife was not privily examined, and after the death of the husband she received payment for the land and invested the money in other land; *It was held*, that she was estopped from taking advantage of the want of a privy examination, and therefore was not entitled to dower in the land sold by her husband. *Ibid.*

3. Where the rights of parties have been once judicially determined it is irregular and improper to attempt to do away with the effect of the judgment, by attempting to try the same right in a different way. *Holly* v. *Holly*, 229.

4. Where the title to a tract of land has been passed upon in one action, the losing party cannot re-open the question by a proceeding to have the land processioned. *Ibid.*

5. Where the true owner of property holds out another as the owner, or allows a third party to appear to have the full power to dispose of it, and innocent third parties are thus led into dealing with such apparent owner, the real owner will be estopped, and the innocent purchaser

protected, but in order for the estoppel to arise, the purchaser must have been misled by the owner. *Mayo* v. *Leggett*, 237.

6. Land was conveyed to a trustee to secure debts, and afterwards a third party took a conveyance of the equity of redemption and paid off the debts, and then sold the land to a person who took possession. The vendor then caused the trustee to sell the land under the terms of the deed, in order to get the legal title out of him; *It was held*, that a purchaser at such sale, with full notice of the facts, got no title, and no estoppel arose against the owner of the equity. *Ibid.*

7. Although a contract be invalid at the time of its execution, yet if the parties to it go on and treat it as valid, they will be estopped to deny its validity, provided they are *sui juris*, and that the invalidity of the contract does not arise from some illegality. *Hendersonville* v. *Price*, 423.

8. So where the defendant executed his bond to a municipal corporation for a license tax instead of paying cash, he is estopped from setting up as a defence that the municipal authorities had no power to take such bond and issue the license, and consequently that the bond was void. *Ibid.*

9. The validity or invalidity of an election may be tested by an action, although it is alleged that innocent persons have acquired rights under the election as declared by the proper authorities. Such alleged innocent parties, although parties to the action, are not precluded by a judgment declaring the election void, but their rights must be tested by actions prosecuted for that purpose. *Goforth* v. *Cons. Co.*, 535.

10. Where an action was brought by the next of kin and heir at law against an administrator for an account and settlement of the estate, in which a consent decree was entered discharging the administrator of all liabilities in regard to his acts, representative or individual, in managing the estate; *It was held*, that such decree released the administrator from the trusts upon which he held certain lands for the heirs. *Jones* v. *Slaughter*, 541.

EVIDENCE:

1. Since the Act of 1881, (*The Code*, §1345,) a judgment against a guardian in favor of his ward is not conclusive and irrebuttable evidence in an action on his bond. *Moore* v. *Alexander*, 34.

2. Statements in regard to the rights of a party made in his presence, and not denied or explained by him, are evidence against him, but this evidence should never be received unless it be of declarations of that kind which naturally call for a denial or explanation, and they must be made on an occasion when a denial might properly be expected. *Tobacco* v. *McElwee*, 71.

3. Where a witness was examined before a commissioner in another suit, in which the defendant in the present action was a party and also a witness, and during such examination the witness made statements in the presence of the defendant derogatory to his rights in this action, which were not denied at the time they were made, nor did the defendant contradict them on his examination in that action; *It was held*, that the occasion was one where it would have been improper for the defendant to have contradicted the witness, and that such declarations were not evidence in this action. *Ibid.*

4. Where the answer does not put the plaintiff's title in issue, it is useless for him to introduce evidence of it. *Gregory* v. *Forbes*, 77.

5. The clerk of the Secretary of State has no power to certify to and affix the great seal of the State to copies of grants and other papers fr m the Secretary of State's office, to be used in evidence. The statute contemplates that this officer should do all official acts himself and does not permit any of them to be done by a deputy. *Beam* v. *Jennings*, 82.

6. Where an action was brought for a tract of land describing it as a whole, and incompetent evidence was admitted which related only to a part, the judgment of the Supreme Court will be for a *venire de novo* generally, and it will not grant a new trial only as to that portion of the land affected by the incompetent evidence. *Ibid.*

7. Where a party claims under a lost deed, he must show by clear and full evidence that such a deed once existed, its legal operation, and its loss. *Loftin* v. *Loftin*, 94.

8. Evidence that the plaintiff asked payment of a debt from the defendant, and that the defendant acknowledged that he owed something, and gave the plaintiff some property to be applied to the debt, which was entered as a credit on the bond sued on, is some evidence, taken with other circumstances, to rebut the presumption of payment from the lapse of time, although there is no evidence that at the time plaintiff was the owner of the bond sued on. *White* v. *Beaman*, 122.

9. The registration books are *prima facie* evidence of the number of qualified voters in a town, but they are open for correction on account of deaths, &c., and *perhaps* for intrinsic disqualifications and errors in admitting persons to register. *Duke* v. *Brown*, 127.

10. Where the answer admits the purchase of land, it is unnecessary to produce the deed, and a witness may testify to circumstances attending the transaction that are not in the deed, although he refers collaterally to the deed. *Cade* v. *Davis*, 139.

11. The common law is presumed to exist in other States, unless it is shown to have been changed by statute. *Ibid.*

12. In an action against the defendant for flooding the plaintiff's land, evidence is admissible to show that the plaintiff knew that the defendant claimed the right to drain his land through that of the plaintiff before he purchased it. *Hair* v. *Downing*, 172.

13. The compensation to which an attorney will be entitled for his services as counsel in collecting a note, executed before 1868, does not give him such an interest in the note as to render him an incompetent witness under §580 of *The Code*. *Grant* v. *Hughes*, 177.

14. Where it is alleged that a person bought land at a sale to make assets for and as agent of the administrator, the deeds passed between them are competent evidence to show the true nature of the transaction. *Ibid.*

15. Where it is alleged that an administrator purchased the land of his intestate at a sale to make assets, for himself, it is not competent for him to prove that other fiduciaries have acted in the same way. *Ibid.*

16. The rule is well settled that a receipt for money does not come within the rule that parol evidence cannot be heard to vary a written contract. *Ibid.*

17. A receipt for a specific sum is not even *prima facie* evidence of an accord and satisfaction, but if the receipt expresses that it is "in full," an inference may be drawn that it is in full satisfaction. *Ibid.*

18. So where an executor of a former administrator settled with the administrator *de bonis non*, a receipt expressed to be in full of amount due to the estate is not an accord and satisfaction, and it may be shown that a larger sum was due. *Ibid.*

19. Records of other States to be used in evidence in this State must have the attestation of the clerk of the Court whose record is offered, and the seal of the Court, if it have one. If there be no seal, this fact must appear in the certificate of the clerk; and the Judge, Chief Justice, or presiding magistrate of such Court must certify that the record is properly attested. *Kinsley* v. *Rumbaugh*, 193.

20. In such case it is not necessary that the Governor of the State should certify under the great seal of the State to the official character of the Judge who makes the certificate, nor that the clerk should make such certificate under his official seal. The provisions of §906 of the Revised Statutes of the United States do not apply to records of Courts and judicial proceedings. *Ibid.*

21. Where a mortgage does not properly describe the property mortgaged, or where, being intended as an agricultural lien, it does not comply with the requirements of the statute, the objection cannot be made to the admission of the instrument in evidence, but as to its legal sufficiency as a conveyance. *Spivey* v. *Grant*, 214.

22. Where a mortgage is made of personal property for the purpose of obtaining supplies to make a crop with, which mortgaged property is claimed by a third party, it is competent evidence to show by the mortgagor any matters necessary to a full understanding of the case. *Ibid.*

23. Where the property is described in a mortgage as "one horse," and the mortgagor only has one horse, the description sufficiently points out the property conveyed, and parol evidence is admissible to identify it, but if he has more than one horse, then it is a patent ambiguity, and nothing passes. *Ibid.*

24. Whenever it becomes necessary to identify the property conveyed in a mortgage from property of a similar kind, or to show what was intended to be conveyed, parol evidence is admissible. *Harris* v. *Woodard*, 232.

25. In an action to recover damages for a libel, it is competent for the defendant to introduce evidence in mitigation of damages, to show the provocation which induced him to publish the libel, but this provocation must originate in the same subject-matter out of which the libel arose, or be closely connected with it. *Knott* v. *Burwell*, 272.

26. In actions for defamation under the former system of pleading, evidence offered to sustain a plea of the general issue could not be considered in mitigation of damages, but this has been changed by *The Code*, §266. *Ibid.*

27. Malice is presumed from the utterance of false defamatory words, and proof of it, other than proof of the utterance of the false and defamatory words, is not necessary, and hence it is always proper to allow the defendant to prove an absence of malice in order to mitigate the damages. *Ibid.*

28. So where the plaintiff had charged the defendant with using false weights in his business, and upon hearing of the charge the defendant sent to the plaintiff and asked him to correct the charge, which the plaintiff promised to do, admitting at the time that the charge was false, but he afterwards refused to retract it, upon which refusal the defendant published the libel sued on; *It was held*, that these facts were admissible in evidence in mitigation of damages. *Ibid.*

29. Evidence that there are private ways near to the proposed location of the public road asked for, is competent both before the County Commissioners and the jury on an appeal to the Superior Court, to show that the proposed road is not necessary, because the private ways fulfilled all the public needs. *King* v. *Blackwell*, 322.

30. In an action to attack a deed in trust to secure creditors for fraud, evidence of the amount of the trust property received by the trustee is immaterial and incompetent. *Hodges* v. *Lassiter*, 351.

31. What constitutes fraud, is a question of law; what is sufficient evidence of the facts required to establish it, is for the jury; and so if the fraud appears on the face of the instrument, it will be declared by the Court without the aid of the jury; but when dependent upon matters *dehors* the deed, it must be found by the jury. *Ibid.*

32. Where in an action to attack a deed for fraud, *prima facie* evidence is given of the *bona fides* of the debt, the burden of proof is on the party attacking the deed to show the fraud, and evidence of such debts may be gathered from the plaintiff's own evidence. *Ibid.*

33. Before the acts and declarations of an alleged agent made and done in the absence of the defendant, the alleged principal, can be received in evidence, the trial Judge must find as a fact that *prima facie* evidence of the agency has been offered, and his ruling upon this question of fact is beyond the reviewing power of the appellate Court. *Smith* v. *Kron*, 392.

34. The continuous use of a road as of right, for the prescribed time, is evidence of the acquirement of the easement, and in the absence of other evidence it is conclusive. *Willey* v. *R. R. Co.*, 408.

35. Interruptions of the use of an easement when brought to the knowledge of the claimant, rebut the presumption of a grant, unless such interruptions are promptly contested by the claimant and the easement reasserted. *Ibid.*

36. Interruptions of the use after the lapse of the time which raises the presumption of a grant of the easement, furnish evidence of, but do not constitute of themselves an abandonment. *Ibid.*

37. Before the records and books of a corporation can be received in evidence for any purpose it must be admitted or proved that the entries were made by an authorized servant or agent of the corporation. *Glenn* v. *Orr*, 413.

38. The records and books of a corporation are at the least *prima facie* evidence of the organization and existence of the corporation. *Ibid.*

39. Where the stock-book of a corporation contained a list of the stockholders, the number of shares of stock owned by each, the sum of money paid by each, and the balance due, such book is evidence against a stockholder in an action to recover the unpaid balance of his subscription, to show that he was a stockholder, and the condition of his stock account, but such evidence may be rebutted. *Ibid.*

40. The burden of proof is on the plaintiff to show that a co-employee of a common master is a superior and not a fellow-servant, unless the nature of the employment shows the extent of the co-employee's powers. *Patton* v. *R. R. Co.*, 455.

41. Where evidence offered by the plaintiff bearing only on one issue is admitted after objection by the defendant it cannot be assigned as error if the verdict on that issue is in favor of the defendants, although the judgment on the entire verdict is against him. *Graves* v. *Trueblood*, 495.

42. It is not erroneous for the trial Judge to reject evidence when there is no issue to which it is applicable. *Ibid.*

43. In an action to reform a deed the evidence of the party asking the reformation, as to the object of purchasing the land, the directions given to the draughtsman, &c., is not sufficient to warrant a verdict upon which the Court would decree a reformation of the deed. *Ibid.*

44. A description of land in a deed, describing it as all the interest, right title and claim the grantors may have in the estate of the deceased father of one of them, more particularly one undivided seventh share which descended to the grantor from her father, is sufficient to admit of parol evidence to fit the description to the thing. *Robbins* v. *Harris*, 557.

(See also No Evidence.)

EVIDENCE, §580:

The compensation to which an attorney will be entitled for his services as counsel in collecting a note, executed before 1868, does not give him such an interest in the note as to render him an incompetent witness under §580 of *The Code*. *Grant* v. *Hughes*, 177.

EVIDENCE, §590:

1. To exclude the testimony of a party to an action upon the ground that it related to a transaction between the witness and a deceased person, it must appear that the knowledge of the witness was derived from a personal transaction with the deceased person. *Thompson* v. *Onley*, 9.

2. Evidence is only rendered incompetent by §590 of *The Code* when it relates to a transaction or communication between the witness and a deceased person of the class mentioned in this section, in regard to some title or interest derived from, through, or under such deceased person. *Loftin* v. *Loftin*, 94.

3. In an action to have the holder of the legal title declared a trustee for the plaintiff, she was allowed, to testify that her father, then dead, gave her the money to purchase the land in controversy when none of the parties to the action claimed any interest under the father. *Ibid.*

4. Where a note was given to an attorney for collection who agreed to receive one half of the amount collected for his services, but he returned the note to the executor of his client without collecting anything; *It was held*, that the attorney had never had any interest or property in the note and was a competent witness. *White* v. *Beaman*, 122.

5. The fact of payment to a deceased person for land purchased of him can be proved when neither the witness nor the estate of the deceased vendor are interested in the result of the action. *Cade* v. *Davis*, 139.

EVIDENCE OF FRAUD:

1. The insertion in a deed of trust of a provision that the trustee shall employ the assignor at a fixed salary to help dispose of the property conveyed, does not render the deed void upon its face, but furnishes evidence of a fraudulent intent, proper to be submitted to the jury. *Frank* v. *Robinson*, 28.

2. In an action to attack a deed in trust to secure creditors for fraud, evidence of the amount of the trust property received by the trustee is immaterial and incompetent. *Hodges* v. *Lassiter*, 351.

3. What constitutes fraud is a question of law; what is sufficient evidence of the facts required to establish it, is for the jury; and so if the fraud appears on the face of the instrument, it will be declared by the Court without the aid of the jury; but when dependent upon matters *dehors* the deed, it must be found by the jury. *Ibid.*

4. Where in an action to attack a deed for fraud, *prima facie* evidence is given of the *bona fides* of the debt, the burden of proof is on the party attacking the deed to show the fraud, and evidence of such debts may be gathered from the plaintiff's own evidence. *Ibid.*

EXECUTION:

1. While a creditor can issue execution and sell property disposed of in fraud of creditors, this does not prevent a Court of equity from restraining the fraudulent donee until the question of fraud can be tried, so that the property can be sold free from any cloud, and under the Code practice all this may be done in one action. *Frank* v. *Robinson*, 28.

2. A bond to stay execution, which provides that the obligors will be responsible for any damages which may arise on account of the acts of the appellant in committing waste, &c., is not a *supersedeas* bond within the meaning of *The Code*, §§435, 554; which contemplate a bond upon which summary judgment may be rendered in the Supreme Court upon the affirmation of the judgment of the Court below. *Alderman* v. *Rivenbark*, 134.

3. Where the undertaking on appeal for the costs and the undertaking to stay execution are in one instrument, the appellee, upon filing the proper proofs of the insolvency of the surety, is entitled to have the appeal dismissed, as prescribed by *The Code*, §554, but where the two undertakings are separate and distinct, the appellant has a right to have his appeal heard, although the surety to the undertaking to stay execution is insolvent. *Ibid.*

4. An execution is not a lien on the personal property of the judgment debtor as against *bona fide* purchasers from its *teste*, but only from the levy. *Weisenfield* v. *McLean*, 248.

5. The lien of an attachment takes effect from its levy, and so, where in an action to compel a corporation to transfer certain stocks on its books, which the plaintiff had purchased at execution sale after it had been attached to answer the judgment, and the defendant answered that said stock had been transferred by the judgment debtor before the rendition of the judgment, but did not aver that such transfer was before the levy of the attachment; *It was held*, that the answer did not raise an issue, or set up a substantial defence. *Morehead* v. *The R. R. Co.*, 362.

FEE SIMPLE:

1. The Court will always give such interpretation to the words of a deed as will effectuate its purpose if the words in any reasonable view will admit of it. *Hicks* v. *Bullock*, 164.

2. Where the words of inheritance only appear in one part of the deed, but the entire language is inartificial and badly expressed, but it appears from the entire instrument that it was the intention of the parties to pass the fee, the Court will construe the deed so as to pass the fee. *Ibid.*

FELLOW-SERVANT:

1. The burden of proof is on the plaintiff to show that a co-employee of a common master is a superior and not a fellow-servant, unless the nature of the employment shows the extent of the co-employee's powers. *Patton* v. *R. R. Co.*, 455.

2. Where the common master invests one of his employees with the power to hire, discharge, command and direct the other employees, the master is liable for his acts, and he is not a fellow-servant, although he works as any other servant and there is nothing in the nature of the employment to show an authority to charge the common master. *Ibid.*

3. So, while there may be nothing in the nature of the employment of a section master on a railroad to charge the master with responsibility for his acts towards his co-laborers, yet if the master gives him authority to command, discharge and employ the laborers, the common master is liable for his misfeasance towards his fellow-laborers in the exercise of the authority so conferred. *Ibid.*

FINDING OF FACT BY JUDGE:

Where the case is left by consent to be tried both as to the facts and the law by the Judge, and he fails to find some material fact, it will be remanded in order that such fact may be found. *Knott* v. *Taylor*, 553.

FIRE INSURANCE:

(See INSURANCE.)

FIXTURES:

1. The term fixtures has a different meaning as applied to different relations, as vendor and vendee, mortgagor and mortgagee, &c., and the right to detach is most favorably applied between landlord and tenant in favor of the tenant. *Foote* v. *Gooch*, 265.

2. The rule as to what are fixtures is the same between vendor and vendee and mortgagor and mortgagee, and whatever would pass in an absolute sale to a vendee will pass as a security to a mortgagee. *Ibid.*

3. Where a mortgagor left in possession improves the mortgaged premises after the execution of the mortgage by the erection of new works and the introduction of new machinery, which are intended to be a permanent annexation to the freehold, he cannot remove such fixtures and thus impair the increased security, and it seems that this rule applies even to trade fixtures. *Ibid.*

4. The intent with which the annexation is made to the freehold enters largely into the question of the right to remove, and if the fixture is made for the purpose of permanently improving the freehold a mortgagor cannot remove it. *Ibid.*

FRAUD:

1. A married woman cannot be estopped by anything in the nature of contract, but where it would amount to a fraud to allow her to repudiate her acts, she is estopped. *Hodges* v. *Powell*, 64.

2. *It seems*, that when a *feme covert* has the consideration in her hands for a contract which she disaffirms, on account of her coverture, the disappointed party may recover it, and when she has converted such consideration into other property, he may follow it and subject it to the satisfaction of his demand by a proceeding *in rem*. *Ibid.*

3. The reason that all transactions of the wife with her husband in regard to her separate property were held void at common law, was, not because there was fraud, but because there might be fraud. This rule is now modified by statute, and the wife may contract with the husband by complying with the provisions of §§1835, 1836 of *The Code*. *Sims* v. *Ray*, 87.

4. Where a party unites with a trustee in a breach of trust, or there are circumstances to put him on his guard and awaken suspicion, he will be required to repay to the trust fund any of its assets which he may

have received in consequence of the breach of trust. *Dancy* v. *Duncan*, 111.

5. Where it is alleged that a person bought land at a sale to make assets, for, and as agent of the administrator, the deeds passed between them are competent evidence to show the true nature of the transaction. *Grant* v. *Hughes*, 177.

6. Where it is alleged that an administrator purchased the land of his intestate at a sale to make assets, for himself, it is not competent for him to prove that other fiduciaries have acted in the same way. *Ibid.*

7. In an action to attack a deed in trust to secure creditors for fraud, evidence of the amount of the trust property received by the trustee is immaterial and incompetent. *Hodges* v. *Lassiter*, 351.

8. What constitutes fraud, is a question of law; what is sufficient evidence of the facts required to establish it, is for the jury; and so if the fraud appears on the face of the instrument, it will be declared by the Court without the aid of the jury; but when dependent upon matters *dehors* the deed, it must be found by the jury. *Ibid.*

9. Where in an action to attack a deed for fraud, *prima facie* evidence is given of the *bona fides* of the debt, the burden of proof is on the party attacking the deed to show the fraud, and evidence of such debts may be gathered from the plaintiff's own evidence. *Ibid.*

10. If the purpose of a conveyance be to hinder and delay creditors, it is fraudulent and void, although the debts secured by it are *bona fide*. *Ibid.*

11. The facts that the administrator who sold the land for assets was the law partner of the counsel who conducted the proceeding; that many of the orders in the proceeding were in the handwriting of the administrator; that the answer of the guardian *ad litem* was also in his handwriting, it appearing that the guardian had taken all necessary steps to protect his wards; and that one of the attorneys for the administrator bid off the land for the purchaser, do not constitute such constructive fraud as to vitiate the judgment, when it is found as a fact that there was no actual fraud. *Ward* v. *Lowndes*, 367.

(See also "STATUTE OF FRAUDS.")

FRAUDULENT CONVEYANCES:

1. The insertion in a deed of trust of a provision that the trustee shall employ the assignor at a fixed salary to help dispose of the property conveyed does not render the deed void upon its face, but furnishes evidence of a fraudulent intent proper to be submitted to the jury. *Frank* v. *Robinson*, 28.

2. An injunction will be continued to the hearing to retain control of a trust fund, when the rights of the parties are doubtful, and the defendant threatens to remove the fund beyond the jurisdiction of the Court. *Ibid.*

3. In such case the Court may allow the defendant to dispose of the property, upon his giving bond to protect the other claimants. *Ibid.*

4. While a creditor can issue execution and sell property disposed of in fraud of creditors, this does not prevent a Court of equity from restraining the fraudulent donee until the question of fraud can be tried, so that the property can be sold free from any cloud, and under the Code practice all this may be done in one action. *Ibid.*

5. Creditors of a deceased person have no lien upon his lands, but only the right to have them subjected to the payment of the debts if there shall be a deficiency of the personal assets, and consequently a conveyance made by the heir or devisee within two years after the grant of administration and advertisement for creditors is not absolutely void, but only subject to be annulled by the contingency of the personal assets proving insufficient. *Davis* v. *Perry*, 260.

6. Where a purchaser bought land from a devisee within the two years, and after the death of the purchaser his administrator sold the land to make assets, more than two years after the issuing of letters, &c., upon the estate of the devisor; *It was held*, that a purchaser at the sale to make assets got a good title as against the creditors of the devisor. *Ibid.*

7. In such case the administrator of the purchaser will hold the money received from the sale of the land in *lieu* thereof, and subject to the claims of the creditors of the devisor. *Ibid.*

8. Where a devisee or heir at law sells land derived from the devisor or ancestor more than two years after the issuing of letters testamentary, &c., to a *bona fide* purchaser for value and without notice, such purchaser gets a good title against the creditors of the devisor or ancestor, but the devisee or heir holds the price received for the land in *lieu* thereof, and subject to the claims of such creditors, just as the land would have been. *Ibid.*

9. A purchaser from an heir or devisee with notice, although after two years, holds the land subject to the claims of the creditors of the devisor or ancestor. *Ibid.*

10. In an action to attack a deed in trust to secure creditors for fraud, evidence of the amount of the trust property received by the trustee is immaterial and incompetent. *Hodges* v. *Lassiter*, 351.

11. What constitutes fraud, is a question of law; what is sufficient evidence of the facts required to establish it, is for the jury; and so if the fraud appears on the face of the instrument it will be declared by the Court without the aid of the jury; but when dependent upon matters *dehors* the deed it must be found by the jury. *Ibid.*

12. Where in an action to attack a deed for fraud *prima facie* evidence is given of the *bona fides* of the debt, the burden of proof is on the party attacking the deed to show the fraud, and evidence of such debts may be gathered from the plaintiff's own evidence. *Ibid.*

13. If the purpose of a conveyance be to hinder and delay creditors, it is fraudulent and void, although the debts secured by it are *bona fide*. *Ibid.*

14. Where land was purchased and paid for by the husband, but the deed was made to a third party in order to defraud the creditors of the husband, he has no such seizin as will support a claim for dower on the part of his widow, although he was in possession of the land; but where land of which the husband was seized during coverture was sold at execution sale, and purchased by a third party with the money of the husband, and the title was made to the purchaser, with a like intent to defraud, the wife is entitled to dower. *Efland* v. *Efland*, 488.

GIFT:

1. In order to perfect a gift of personal property there must be an actual delivery, if the nature of the property will admit of an actual delivery, and if not, then some act must be done equivalent to actual delivery, and which will have the effect to pass the title to it. *Medlock* v. *Powell*, 499.

2. So where a father said to his son that he might have a certain colt, if he would raise it, and there was other evidence tending to show that the father intended that the son should have the colt, but there was no evidence to show a delivery; *It was held*, that the property did not pass, and the colt belonged to the father. *Ibid.*

GRANDPARENT:

(See PARENT.)

GRANT:

1. An entry-taker has no authority to act upon the application of a claimant for lands not situated in his county, and an entry of such application on his records would be void. *Harris* v. *Norman*, 59.

2. The entry, the copy thereof, the warrant for a survey, the survey and the plats constitute the essential groundwork of the grant, and in their absence there is no authority to issue the grant. *Ibid.*

3. Where all the proceedings preliminary to the issuing of the grant described the land as lying in one county, and the land was described in the grant as lying in that county, but as a matter of fact it was situated in another county, the grant is void. *Ibid.*

4. Where the invalidity of a grant appears on its face it is not necessary to attack it by a direct proceeding, but it may be taken advantage of whenever offered in evidence. *Ibid.*

5. The provisions of *The Code*, §2784, only extend to cases where the entry of land lying partly in two counties, which is unknown to the grantee, is made only in one county. In such cases the statute cures the defect. *Ibid.*

6. The State can only grant land under navigable water for wharf purposes, and county commissioners have no power to confer upon a party a right to build a wharf upon such land for the purpose of a public road. *Gregory* v. *Forbes*, 77.

7. The riparian owner of land has the right, under our entry laws, to enter the water front up to deep water, for the purpose of erecting a wharf, and in such case the title to the land passes. *Ibid.*

8. The clerk of the Secretary of State has no power to certify to and affix the great seal of the State to copies of grants and other papers from the Secretary of State's office, to be used in evidence. The statute contemplates that this officer should do all official acts himself and does not permit any of them to be done by a deputy. *Beam* v. *Jennings*, 82.

9. As the presumption of a grant will arise by an adversary and continuous use of an easement for twenty years, so a disuse occurring afterwards for the same length of time will raise a presumption of a surrender or extinction of the easement in favor of the servient tenement. *Willey* v. *R. R. Co.*, 408.

GUARDIAN:

1. A judgment against an infant when he appears by attorney but has no guardian or next friend is not void, but only voidable. *Tate* v. *Mott*, 19.

2. A guardian appointed in another State has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian it will be treated as if he were next friend. *Ibid.*

3. Since the Act of 1881, (*The Code*, §1345,) a judgment against a guardian in favor of his ward is not conclusive and irrebuttable evidence in an action on his bond. *Moore* v. *Alexander*, 34.

4. Infants may sue or be sued and are as much bound by the judgment as persons *sui juris*, but infants must sue by a next friend or guardian and defend actions against them by a regular guardian, or if they have none in this State, by a guardian *ad litem*. *Ward* v. *Lowndes*, 367.

5. The provisions of the statute in regard to the appointment of guardians *ad litem* should be strictly observed, but mere irregularities in observing them, not affecting a substantial right, will not vitiate judgments and decrees obtained in the action or proceeding in which such irregularities exist. *Ibid.*

GUARDIAN *AD LITEM:*

(See GUARDIAN.)

HOMESTEAD:

1. Although the real property of a judgment debtor is incapable of division, and although it would be more advantageous to creditors to have it sold, the Court has no power to order a sale of the land, and a payment to the debtor of one thousand dollars in money in *lieu* of his homestead. *Oakley* v. *Van Noppen*, 247.

2. Where the homestead has once been regularly allotted and set apart, it cannot be re-allotted at the instance of a judgment debtor whose debt was in existence when the allotment was made, except for fraud or other irregularity. *Gully* v. *Cole*, 447.

3. *Quære*, as to the equitable remedy which creditors might have, if the homestead had increased in value since its allotment. *Ibid.*

HUSBAND AND WIFE:

(See MARRIED WOMEN.)

INDICTMENT:

1. *Quære*, whether a juror who has an indictment pending and at issue against him in the Superior Court, is disqualified from serving on the jury by the statute which prohibits those having a *suit* so pending and at issue from serving. *Hodges* v. *Lassiter*, 351.

2. In order to disqualify a juror from serving under this statute, the suit must be at issue, and so where an indictment was pending against a juror, to which he had never pleaded; *It was held*, that he was not disqualified under this statute, even if it applies to indictments. *Ibid.*

INFANTS:

1. The Superior Courts have succeeded to all the jurisdiction of the late Courts of Equity in respect to infants, and they have authority to direct sales of their property, both real and personal, in proper cases. *Tate* v. *Mott*, 19.

2. The guardian or next friend of an infant is not, properly speaking, a party to the action, although his name appears in the record. *Ibid.*

3. The next friend of an infant ought always to be appointed by the Court, and really he is an officer of the Court, and under its supervision and control. *Ibid.*

4. The Court has power, for good cause shown, to remove the next friend of an infant litigant, and appoint another as often as may be necessary. *Ibid.*

5. It is not essential that the infant should know that an action has been brought in his favor by a next friend, as his incapacity to judge for himself is presumed, but the Court may inquire into the propriety of the action and take such steps as may be necessary. *Ibid.*

6. Where an infant sues by a next friend he is as much bound by the judgment as an adult, and this rule applies to non-resident as much as to resident infants. *Ibid.*

7. A judgment for or against an infant, when he appears by attorney, but has no guardian or next friend, is not void, but only voidable. *Ibid.*

8. A guardian appointed in another State has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian it will be treated as if he were next friend. *Ibid.*

9. So, where non-resident infant tenants in common filed an *ex parte* petition to sell land for partition, by their guardian, who was a non-resident; *It was held*, that the decree of sale was not void, and could not be attacked collaterally. *Ibid.*

10. Since the Act of 1881, (*The Code*, §1345,) a judgment against a guardian in favor of his ward is not conclusive and irrebuttable evidence in an action on his bond. *Moore* v. *Alexander*, 34.

11. A judgment against an infant who has been served with process is not void, but at most is only irregular and voidable. *Syme* v. *Trice*, 243.

12. The Court will not set aside an irregular judgment against an infant as of course, and it will not do so when it appears from the record or otherwise that the infant suffered no substantial wrong and the rights of third parties, without notice, have intervened. *Ibid.*

13. Infants may sue or be sued, and are as much bound by the judgment as persons *sui juris*, but infants must sue by a next friend or guardian, and defend actions against them by a regular guardian, or if they have none in this State, by a guardian *ad litem*. *Ward* v. *Lowndes*, 367.

14. The provisions of the statute in regard to the appointment of guardians *ad litem* should be strictly observed, but mere irregularities in observing them, not affecting a substantial right, will not vitiate judgments and decrees obtained in the action or proceeding in which such irregularities exist. *Ibid.*

15. Courts obtain jurisdiction over infant defendants over fourteen years old exactly in the same manner in which they do over adults, but if the

infant is under fourteen, besides serving them personally and leaving a copy with them, a copy of the summons must also be delivered to the father, mother, or guardian, or if there is none in this State, then to the person who has the care and control of the infant, and in the case of non-resident infants by publication as in other cases. *Ibid.*

16. An infant is liable both civilly and criminally for his torts, and in an action for damages, it is immaterial that the tort was committed by the direction of one having authority over the infant. *Smith* v. *Kron*, 392.

17. While infants are incapable of making a contract with an agent either express or implied, so as to bind them for his torts committed in pursuance of the agency; *It seems*, that an infant is liable for torts committed by his agent in the necessary prosecution of the business of the agency under the maxim, *qui facit per alium, facit per se. Ibid.*

INJUNCTION:

1. Where the complaint states facts sufficient to authorize a temporary injunction, and the answer raises serious issues, the determination of which is doubtful, it is not error to continue the injunction till the hearing upon the merits, especially when it appears that the subject-matter of the action will remain unimpaired. *Whittaker* v. *Hill*, 2.

2. An injunction will be continued to the hearing to retain control of a trust fund, when the rights of the parties are doubtful, and the defendant threatens to remove the fund beyond the jurisdiction of the Court. *Frank* v. *Robinson*, 28.

3. In such case the Court may allow the defendant to dispose of the property, upon his giving bond to protect the other claimants. *Ibid.*

4. While a creditor can issue execution and sell property disposed of in fraud of creditors, this does not prevent a Court of equity from restraining the fraudulent donee until the question of fraud can be tried, so that the property can be sold free from any cloud, and under the Code practice all this may be done in one action. *Ibid.*

5. In applications to continue injunctions to the hearing the Supreme Court will review the facts and pass upon their sufficiency to warrant the judgment appealed from. *Evans* v. *The Railroad*, 45.

6. Where it appeared by the affidavit of two physicians that a sewer used by the defendant was dangerous to the health of the plaintiffs; *It was held* no error to continue the injunction against its nse to the hearing. *Ibid.*

7. In such case it is immaterial that the sewer is also used by others. *Ibid.*

8. When the County Commissioners ascertain and declare the result of an election their action and declaration cannot be attacked collaterally, but it may be by a direct proceeding for that purpose. *McDowell* v. *Cons. Co.*, 514. *Goforth* v. *Cons. Co.*, 535.

9. In an action brought to have an election to ratify the issue of bonds to a railroad corporation declared void, and to restrain the issuing of the bonds, it was made *prima facie* at least, to appear, that the election was not called in accordance with law; that no notice of the election was given; that no opportunity was given for registration to such persons as had become qualified since the last election; that as a matter of fact, a majority of the qualified voters did not vote for the measure, and that there were various other grave irregularities; *It was held*, that an injunction until the hearing should be granted, to restrain all action under and in pursuance of the election. *Ibid.*

10. Where in such case, it was made to appear, that since the appeal was taken, the bonds had been delivered; *It was held*, that it was immaterial. *Ibid.*

INSURANCE:

1. Where an application for a life insurance policy declares on its face that payment of the premium is a condition precedent to the issuing of the policy, the policy is not in force until the premium is actually paid. *Ormond* v. *The Ins. Co.*, 158.

2. Any change in the health of the insured between the application for life insurance and the issuing of the policy should be communicated to the insurer. *Ibid.*

3. Where prepayment of the premium is made an essential part of the agreement no agent can dispense with its requirement. *Ibid.*

4. So, where the insured made application for insurance, and the application set out that the policy would not take effect until the premium was paid, but the agent of the insurer told the applicant that he could pay the premium either at that time or when the policy was delivered, and the applicant elected to pay at the latter time, but died before the policy was received; *It was held*, that the policy never took effect and the insurer was not liable. *Ibid.*

5. In an action on a policy of insurance wherein several distinct articles are insured it is not proper to submit separate issues as to the value of each separate article. *Cuthbertson* v. *Ins. Co.*, 480.

6. The application for insurance forms a part of the contract, and the inquiry and answers are tantamount to an agreement that the matter enquired about is material, and its materiality is not open to be tried by the jury. *Ibid.*

7. In the absence of fraud or mistake a party will not be heard to say that he was ignorant of the contents of a writing signed by him, containing a contract on his part. *Ibid.*

8. So where a party signed an application for insurance which contained a warranty that the property belonged to the applicant in fee, and that there were no liens on it, he will not be allowed to testify that he did not know that such a fact was stated in the application. *Ibid.*

9 Where an application for insurance contained a statement which was made a warranty by the terms of the policy, that the house in which the insured property was belonged to the applicant in fee, and that there were no liens on the property insured; *It was held*, that the warranty was broken when it appeared that the house was built on land leased by the applicant, and was to become the property of the lessor at the end of the lease, and that the title to the property insured was vested in another person as a security for the purchase money. *Ibid.*

10. Where several distinct kinds of property are insured in the same policy, and there is a false statement in the application as to some of it, it avoids the policy as to all, as the policy is one entire and indivisible contract. *Ibid.*

INTEREST:

Where a mortgage is executed to secure a usurious note, the usury only affects the interest and does not impair the validity of the mortgage. *Spivey* v. *Grant*, 214.

INTERSTATE COMMERCE:

1. A contract with a railroad company to carry freight from a place within this State to a place within another State at a fixed price for the entire route, the price thus charged being greater than that required from others for same service, is not embraced by the provisions of §1966 of *The Code*. *McLean* v. *The Railroad*, 1.

2. Such a contract is also a matter affecting interstate commerce, the control of which is vested exclusively in Congress. *Ibid.*

ISSUES:

1. Where the plaintiff does not object to the counter-claim on account of imperfect pleading, the Supreme Court, on appeal, will consider the issues which were tried on it in the Court below. *Smith* v. *McGregor*, 101.

2. No issue is necessary when the facts are not disputed. *Alderman* v. *Rivenbark*, 134.

3. In an action for damages for an injury caused by the negligence of the defendant, where the defence is contributory negligence, it is sometimes proper to submit two issues, one as to the negligence of the defendant, and the other as to the contributory negligence of the plain-

tiff, yet when the action of both has contributed to the injury, it is allowable to submit an issue only as to the defendant's negligence, with instructions to find that in the negative, if the jury believe that the plaintiff's conduct contributed to the injury. *Scott* v. *R. R. Co.*, 428.

4. The only issues proper to be submitted to the jury are those raised by the constitutive facts alleged on the one side and denied on the other; and those issues which are merely evidential, and when found by the jury, only furnish facts which would be evidence to prove the main issue, should never be submitted. *Patton* v. *R. R. Co.*, 455.

5. It is not every matter alleged on the one side and denied on the other that raises an issue to be submitted to the jury, but only such allegations and denials as involve facts necessary to the determination of the controversy. *Cuthbertson* v. *Ins. Co.*, 480.

6. The form in which issues are submitted is of little consequence, if the material facts in controversy are clearly presented by them, but all unnecessary and immaterial issues should be avoided, as they tend to confuse and mislead the jury. *Ibid.*

7. In an action on a policy of insurance wherein several distinct articles are insured, it is not proper to submit separate issues as to the value of each separate article. *Ibid.*

8. The submission of immaterial issues, when not prejudicial to the appellant, cannot be assigned as error. *Ibid.*

9. Where evidence offered by the plaintiff bearing only on one issue, is admitted after objection by the defendant, it cannot be assigned as error, if the verdict on that issue is in favor of the defendants, although the judgment on the entire verdict is against him. *Graves* v. *Trueblood*, 495.

10. It is not erroneous for the trial Judge to reject evidence when there is no issue to which it is applicable. *Ibid.*

JOINDER OF CAUSES OF ACTION:

1. A cause of action against a Clerk of the Superior Court for damages resulting from malfeasance in accepting an insufficient bond from an administrator cannot be joined with a cause of action against such administrator and his sureties for a *devastavit*, the respective liabilities of the parties having no connection. *The Code*, §267. *Mitchell* v. *Mitchell*, 14.

2. The provision of *The Code*, §272, authorizing the Court to direct a division of improperly joined *causes* of action, does not extend to the cases where there is also a misjoinder of *parties* to the action. *Ibid.*

JUDGE'S CHARGE:

1. Under the present practice, where a party claims under a lost deed it is not error for the trial Judge to charge the jury that the lost deed could only be established by clear and satisfactory proof. *Loftin* v. *Loftin*, 94.

2. It would be error in the trial Judge to single out the testimony of one witness, and charge the jury that if they believe the testimony of that witness, they would find in accordance therewith, when there are several witnesses who testify in regard to the same matter. *Weisenfield* v. *McLean*, 248.

3. A prayer for instructions, which would involve an expression of opinion by the Judge on the facts of the case, must be refused. *Ibid.*

4. Where it was a disputed question in the case whether a mortgagor lived in one county or the other, a prayer for instructions which assumes that he resided in one of the counties, was properly refused. *Ibid.*

5. It is well settled that the omission of the trial Judge to charge the jury in a particular aspect of the case, is not ground for a new trial, when the complaining party did not ask for such a charge. *King* v. *Blackwell*, 322.

6. Exceptions to the Judge's charge and prayers for special instructions must be made before verdict. *Willey* v. *R. R. Co.*, 408.

7. Where the appellant excepted to the Judge's charge on the question of damages, but did not point out what he considered to be the error, and did not ask for any special instruction; *It was held*, that the judgment would be affirmed, if the charge contained no intrinsic error although it was not as full as it might have been. *Ibid.*

8. It is not error for the trial Judgs to refuse to charge that certain acts or omissions of the plaintiff amount to contributory negligence, when the evidence in regard to them is conflicting. *Scott* v. *R. R. Co.*, 428.

9. Error cannot be assigned in this Court that the trial Judge gave the instructions asked by the appellee to the jury, when no exception thereto is made in the record. *Ibid.*

JUDGMENT:

1. Where an infant sues by a next friend he is as much bound by the judgment as an adult, and this rule applies to non-resident as much as to resident infants. *Tate* v. *Mott*, 19.

2. A judgment for or against an infant, when he appears by attorney, but has no guardian or next friend, is not void, but only voidable. *Ibid.*

3. Since the Act of 1881, (*The Code*, §1345,) a judgment against a guardian in favor of his ward is not conclusive and irrebuttable evidence in an action on his bond. *Moore* v. *Alexander*, 34.

4. If property is transferred by the defendant pending a suit involving its title, in which there is afterwards a judgment for the plaintiff, the judgment relates to the beginning of the action and binds the property in the hands of the purchaser, and when the transaction and suit are in the same county and the record furnishes evidence of the claim, this rule is not affected by the provisions of *The Code*, §229. *Dancy* v. *Duncan*, 111.

5. Where the rights of parties have been once judicially determined, it is irregular and improper to attempt to do away with the effect of the judgment by attempting to try the same right in a different way. *Holley* v. *Holley*, 229.

6. Where a Judge at one term of the Court strikes out a judgment made at a former term and substitutes another in its stead; *It was held*, that this could not be assigned as error in the Supreme Court for the first time, there being no exception to the action of the Court entered at the time. *Cowles* v. *Curry*, 331.

7. By consent a judgment rendered at a former term may be stricken out and a new judgment substituted in its place. *Ibid.*

8. The judgment and decrees of a Court which has jurisdiction, although erroneous or irregular, cannot be attacked in a collateral proceeding. If erroneous, they must be corrected by appeal; if irregular, they must be set aside by a motion in the cause, made in a reasonable time. *Ward* v. *Lowndes*, 367.

9. The recitals in a final judgment cannot change the force and effect of an order made in a previous stage of the action. *Jackson* v. *McLean*, 474.

10. The validity or invalidity of an election may be tested by an action, although it is alleged that innocent persons have acquired rights under the election as declared by the proper authorities. Such alleged innocent parties, although parties to the action, are not precluded by a judgment declaring the election void, but their rights must be tested by actions prosecuted for that purpose. *Goforth* v. *Cons. Co.*, 535.

11. Where an action was brought by the next of kin and heir at law against an administrator for an account and settlement of the estate, in which a consent decree was entered discharging the administrator of all liabilities in regard to his acts, representative or individual, in managing the estate; *It was held*, that such decree released the administrator from the trusts upon which he held certain lands for the heirs. *Jones* v. *Slaughter*, 541.

JUDGMENT—IRREGULAR:

1. Where it is sought to set aside a judgment or decree on the ground of irregularity, a motion in the cause, and not a new action, is the appropriate remedy, although the action may be at an end. *Morris* v. *White*, 91.

2. It is well settled that a motion in the cause, and not a new action, is the proper remedy to set aside an irregular judgment, whether the irregularity appears on the face of the record or not, even although the action is at an end. It is otherwise when it is sought to attack a judgment for fraud, which must be done by a new action if the action in which the judgment sought to be attacked is at an end. *Syme* v. *Trice*, 243.

3. Where an adult was served with process in a cause, but filed no answer and made no objection to any of the orders and decrees until three and a half years after they were passed, and then showed no injury to have resulted to her from the decrees; *It was held*, that they would not be set aside at her instance. *Ibid.*

4. A judgment against an infant who has been served with process is not void, but at most is only irregular and voidable. *Ibid.*

5. The Court will not set aside an irregular judgment against an infant as of course, and it will not do so when it appears from the record or otherwise that the infant suffered no substantial wrong and the rights of third parties, without notice, have intervened. *Ibid.*

6. Where a Special Proceeding was brought to sell land for assets in pursuance of orders in which the land was sold, but on account of grave irregularities in this proceeding another was brought with the consent of the administrator and purchaser, to which the heirs were parties; *It was held*, that such second proceeding was sufficient to cure the irregularities in the first, and none of the parties thereto could be heard to complain of it. *Ward* v. *Lowndes*, 367.

7. Where proceedings were brought before the Probate Judge which should have been brought before the Clerk, and *vice versa*, the irregularity is cured by the statute (Bat. Rev., ch. 17, §§ 425, 426). *Ibid.*

8. The judgments and decrees of a Court which has jurisdiction, although erroneous or irregular, cannot be attacked in a collateral proceeding. If erroneous, they must be corrected by appeal; if irregular, they must be set aside by a motion in the cause, made in a reasonable time. *Ibid.*

9. The provisions of the statute in regard to the appointment of guardians *ad litem* should be strictly observed, but mere irregularities in observing them, not affecting a substantial right, will not vitiate judgments and decrees obtained in the action or proceeding in which such irregularities exist. *Ibid.*

JUDICIAL SALES:

1. The Superior Courts have succeeded to all the jurisdiction of the late Courts of Equity in respect to infants, and they have authority to direct sales of their property, both real and personal, in proper cases. *Tate* v. *Mott*, 19.

2. So, where non-resident infant tenants in common filed an *ex parte* petition to sell land for partition, by their guardian, who was a non-resident; *It was held*, that the decree of sale was not void, and could not be attacked collaterally. *Ibid.*

3. The facts that the administrator who sold the land for assets was the law partner of the counsel who conducted the proceeding; that many of the orders in the proceeding were in the handwriting of the administrator; that the answer of the guardian *ad litem* was also in his handwriting, it appearing that the guardian had taken all necessary steps to protect his wards; and that one of the attorneys for the administrator bid off the land for the purchaser, do not constitute such constructive fraud as to vitiate the judgment, when it is found as a fact that there was no actual fraud. *Ward* v. *Lowndes*, 367.

4. A purchaser at a judicial sale, after he has paid the purchase money, may direct the commissioner to make title to another, and this furnishes no ground to set aside the order of sale. *Ibid.*

JURISDICTION—SUPERIOR COURTS:

1. The Superior Courts have succeeded to all the jurisdiction of the late Courts of Equity in respect to infants, and they have authority to direct sales of their property, both real and personal, in proper cases. *Tate* v. *Mott*, 19.

2. Where an infant sues by a next friend he is as much bound by the judgment as an adult, and this rule applies to non-resident as well as to resident infants. *Ibid.*

3. Courts of equity will not entertain a suit for the construction of a devise, but will leave the devisee to assert his right at law, in an action to recover the land. *Woodlief* v. *Merritt*, 226.

4. While the assignment of dower is a Special Proceeding of which the Clerk has jurisdiction, yet if any equitable element is involved, which under the former practice would have been cognizable in a Court of equity, the Superior Court in term has jurisdiction, and the application for dower becomes a civil action. *Efland* v. *Efland*, 488.

5. Where an action was brought by a widow, alleging that the legal title to certain land was in the defendants, but that they held it in trust for her deceased husband, and asking that they be declared trustees and that her dower be assigned in the land; *It was held*, that the Superior Court in term, and not the Clerk, had jurisdiction. *Ibid.*

JURISDICTION—SUPREME COURT:

1. In applications to continue injunctions to the hearing the Supreme Court will review the facts and pass upon their sufficiency to warrant the judgment appealed from. *Evans* v. *The Railroad*, 45.

2. The Supreme Court has the power in a proper case to remand causes, to the end that proper amendments may be made or further proceedings taken in the Court below. *Holley* v. *Holley*, 229.

JURY:

1. Wherever the statute directs the County Commissioners not to include the names of a class of persons if drawn to serve on the jury in the panel, as in case of those having suits pending and at issue in the Superior Courts, it is a fundamental objection to the juror whenever it is made to appear and is a cause of challenge, although the County Commissioners may have allowed his name to go upon the *venire*. *Hodges* v. *Lassiter*, 351.

2. *Quære*, whether a juror who has an indictment pending and at issue against him in the Superior Court is disqualified from serving on the jury by the statute which prohibits those having a *suit* so pending and at issue from serving. *Ibid.*

3. In order to disqualify a juror from serving under this statute, the suit must be at issue, and so where an indictment was pending against a juror, to which he had never pleaded; *It was held*, that he was not disqualified under this statute, even if it applies to indictments. *Ibid.*

See also "VERDICT."

JURY TRIAL:

Where an order of reference is made without objection or opposition it is equivalent to consent and is a waiver of the right to have the issue tried by a jury. *Grant* v. *Hughes*, 177.

LANDLORD AND TENANT:

One let into possession of land under a contract to purchase is an occupant at the will of the vendor, and he so continues until the purchase money is paid. *Allen* v. *Taylor*, 37.

LEGACY:

A will in one clause devised a tract of land to the testator's son W. In another clause a pecuniary legacy to a daughter was made an express charge on this land, and in the same clause another tract of land was devised to another son, C, and a pecuniary legacy to another daughter, I. This last legacy was not made an express charge on the land devised to C, but the will provided that the son W of the testator should manage the entire estate, including the land devised to C, until the legatees and devisees arrived at full age, and that he should pay the legacy to I by installments; *It was held*, that the legacy to I was a charge on the land devised to C. *Carter* v. *Worrell*, 358.

LIBEL:

1. In action to recover damages for a libel it is competent for the defendant to introduce evidence in mitigation of damages, to show the provocation which induced him to publish the libel, but this provocation must originate in the same subject-matter out of which the libel arose, or be closely connected with it. *Knott* v. *Burwell*, 272.

2. In actions for defamation under the former system of pleading, evidence offered to sustain a plea of the general issue could not be considered in mitigation of damages, but this has been changed by *The Code*, §266. *Ibid.*

3. Malice is presumed from the utterance of false defamatory words, and proof of it, other than proof of the utterance of the false and defamatory words, is not necessary, and hence it is always proper to allow the defendant to prove an absence of malice in order to mitigate the damages. *Ibid.*

4. So where the plaintiff had charged the defendant with using false weights in his business, and upon hearing of the charge the defendant sent to the plaintiff and asked him to correct the charge, which the plaintiff promised to do, admitting at the time that the charge was false, but he afterwards refused to retract it, upon which refusal the defendant published the libel sued on; *It was held*, that these facts were admissible in evidence in mitigation of damages. *Ibid.*

LICENSE:

While the Board of Commissioners of a municipal corporation cannot issue a license to retail liquors for a longer period than one year, the time need not begin and terminate with the term of office of the Board which grants it, for they can grant a license which extends beyond their term of office, provided that it does not exceed one year and does not begin to take effect after their term of office has expired. *Hendersonville* v. *Price*, 423

LIEN:

1. Creditors of a deceased person have no lien upon his lands, but only the right to have them subjected to the payment of the debts if there shall be a deficiency of the personal assets, and consequently a conveyance made by the heir or devisee within two years after the grant of administration and advertisement for creditors is not absolutely void, but only subject to be annulled by the contingency of the personal assets proving insufficient. *Davis* v. *Perry*, 260.

2. The act of 1879, which provides that mortgages executed by corporations on their property or earnings shall not exempt the property or earnings from executions for the satisfaction of a judgment obtained for labor performed, materials furnished, or for torts committed by

such corporation, so far as it relates to labor and materials furnished, is only intended to more effectually secure the lien given by the Constitution and statutes to laborers and material men, and was not intended to create a lien in favor of parties who furnish machinery, &c., to the corporation upon its personal credit. *Bank* v. *M'f'g. Co.*, 298.

3. The lien of an attachment takes effect from its levy, and so, where in an action to compel a corporation to transfer certain stocks on its books, which the plaintiff had purchased at execution sale after it had been attached to answer the judgment, and the defendant answered that said stock had been transferred by the judgment debtor before the rendition of the judgment, but did not aver that such transfer was before the levy of the attachment; *It was held*, that the answer did not raise an issue, or set up a substantial defence. *Morehead* v. *The R. R. Co.*, 362.

LIFE ESTATE:

Where by will land is devised to a trustee, to rent the land and pay the rents over to a person during his life, the *cestui que trust* takes no estate in the land, but only the right to have the rents paid to him. *Hicks* v. *Bullock*, 164.

LIFE INSURANCE:

(See INSURANCE.)

LIMITATION:

(See STATUTE OF LIMITATIONS.)

LIS PENDENS:

If property is transferred by the defendant pending a suit involving its title, in which there is afterwards a judgment for the plaintiff, the judgment relates to the beginning of the action, and binds the property in the hands of the purchaser, and when the transaction and suit are in the same county and the record furnishes evidence of the claim, this rule is not affected by the provisions of *The Code*, §229. *Dancy* v. *Duncan*, 111.

LIQUORS:

While the Board of Commissioners of a municipal corporation cannot issue a license to retail liquors for a longer period than one year, the time need not begin and terminate with the term of office of the Board which grants it, for they can grant a license which extends beyond their term of office, provided that it does not exceed one year, and does not begin to take effect after their term of office has expired. *Hendersonville* v. *Price*, 423.

LOST DEED:

1. Where a party claims under a lost deed, he must show by clear and full evidence that such a deed once existed, its legal operation, and its loss. *Loftin* v. *Loftin*, 94.

2. Under the present practice, where a party claims under a lost deed, it is not error for the trial Judge to charge the jury that the lost deed could only be established by clear and satisfactory proof. *Ibid.*

MALICE:

1. Malice is presumed from the utterance of false defamatory words, and proof of it, other than proof of the utterance of the false and defamatory words, is not necessary, and hence it is always proper to allow the defendant to prove an absence of malice in order to mitigate the damages. *Knott* v. *Burwell*, 272.

2. So where the plaintiff had charged the defendant with using false weights in his business, and upon hearing of the charge the defendant sent to the plaintiff and asked him to correct the charge, which the plaintiff promised to do, admitting at the time that the charge was false, but he afterwards refused to retract it, upon which refusal the defendant published the libel sued on; *It was held*, that these facts were admissible in evidence in mitigation of damages. *Ibid.*

MANDAMUS:

Whether the duty of the County Commissioners of inducting persons who have received a certificate of election into office is merely ministerial or not; *Quære*, but if the commissioners refuse to induct one who is plainly ineligible, the Courts will not compel them to do so, and thus put one into an office which he cannot constitutionally hold. *McNeill* v. *Somers*, 467.

MARRIED WOMAN:

1. A married woman cannot be estopped by anything in the nature of contract, but where it would amount to a fraud to allow her to repudiate her acts, she is estopped. *Hodges* v. *Powell*, 64.

2. Where a husband and wife joined in a bond to convey a tract of land to the defendant, but the wife was not privily examined, and after the death of the husband she received payment for the land and invested the money in other land; *It was held*, that she was estopped from taking advantage of the want of a privy examination, and therefore was not entitled to dower in the land sold by her husband. *Ibid.*

3. *It seems*, that when a *feme covert* has the consideration in her hands for a contract which she disaffirms, on account of her coverture, the disappointed party may recover it, and when she has converted such consideration into other property, he may follow it and subject it to the satisfaction of his demand by a proceeding *in rem*. *Ibid.*

4. While a wife may execute a power of appointment conferred upon her in favor of her husband, yet she cannot convey her land directly to him, except as allowed by *The Code*, §§1835, 1836. *Sims* v. *Ray*, 87.

5. The reason that all transactions of the wife with her husband in regard to her separate property were held void at common law, was not because there was fraud, but because there might be fraud. This rule is now modified by statute, and the wife may contract with the husband by complying with the provisions of §§1835, 1836 of *The Code*. *Ibid.*

6. Where an agreement is made between husband and wife, that the proceeds of a sale of the wife's land shall be invested in other land in the name of the wife, such agreement is within the provisions of the statute of frauds, and cannot be specially enforced, but relief will be given the wife by declaring her to be entitled to the proceeds of her land, and *perhaps* to charge the land purchased with her money with its payment. *Cade* v. *Davis*, 139.

7. Where a husband contracts with his wife to invest money received from a sale of her land in other land, the title to which is to be taken to the wife, but instead he takes the title to himself, he must either execute his contract by conveying the land to his wife or restore to her the money which he received from her estate. *Ibid.*

8. The privy examination of a *feme covert* which sets out that she signed the deed of her own free will and accord, and without any compulsion of her husband, is sufficient, without adding the words, "and doth voluntarily assent thereto." *Robbins* v. *Harris*, 557.

9. Where under the old system, it appeared that an order was made appointing a justice of the peace to take a privy examination, it will be presumed that the justice was a member of the County Court appointed for that purpose. *Ibid.*

MASTER AND SERVANT:

1. The burden of proof is on the plaintiff to show that a co-employee of a common master is a superior and not a fellow-servant, unless the nature of the employment shows the extent of the co-employee's powers. *Patton* v. *R. R. Co.*, 455.

2. Where the common master invests one of his employees with the power to hire, discharge, command and direct the other employees, the master is liable for his acts, and he is not a fellow-servant, although he works as any other servant and there is nothing in the nature of the employment to show an authority to charge the common master. *Ibid.*

3. So, while there may be nothing in the nature of the employment of a section master on a railroad to charge the master with responsibility for his acts towards his co-laborers, yet if the master gives him au-

thority to command, discharge and employ the laborers, the common master is liable for his misfeasance towards his fellow-laborers in the exercise of the authority so conferred. *Ibid.*

MORTGAGE:

1. Where, after a sale of land to make assets, the heir at law mortgages his interest in the land, the mortgage has the effect of putting the mortgagee in the place of the mortgagor, so that he is entitled to what remains after the payment of the debts to the amount of his mortgage. *Dancy* v. *Duncan*, 111.

2. Where A is indebted to B by notes secured by a mortgage, and C executes his notes to B in satisfaction of the debt, who delivers up A's notes and cancels the mortgage, and A executes his notes, secured by mortgage, to C for the same debt; *It was held*, that the discharge of the debt by B is a sufficient consideration, and that C can collect the notes of A and foreclose the mortgage before he has paid the debt to B. *Alderman* v. *Rivenbark*, 134.

3. Where a mortgage does not properly describe the property mortgaged, or where, being intended as an agricultural lien, it does not comply with the requirements of the statute, the objection cannot be made to the admission of the instrument in evidence, but as to its legal sufficiency as a conveyance. *Spivey* v. *Grant*, 214.

4. Where a mortgage is made of personal property for the purpose of obtaining supplies to make a crop with, which mortgaged property is claimed by a third party, it is competent evidence to show by the mortgagor any matters necessary to a full understanding of the case. *Ibid.*

5. Where the property is described in a mortgage as "one horse," and the mortgagor only has one horse, the description sufficiently points out the property conveyed, and parol evidence is admissible to identify it, but if he has more than one horse, then it is a patent ambiguity, and nothing passes. *Ibid.*

6. Where a mortgage conveyed "one yoke of oxen," and it appeared that the mortgagor owned four oxen when the mortgage was made, a charge which instructed the jury that the oxen would none of them be included, unless they were satisfied that some particular two were usually worked together as a yoke, was held to be correct. *Ibid.*

7. Where an instrument is intended by the parties to operate as an agricultural lien under the statute, but it fails to set out some essential matter so that it cannot take effect as such statutory lien, it will yet be given effect as a common law mortgage, if in form sufficient for that purpose. *Ibid.*

8. Where several persons unite in executing a bond to a commission merchant for supplies to be furnished them, and one of them gives a chattel mortgage to secure the amounts advanced to him, which mortgage erroneously recites the amount of the bond, but truly specifies the amount of the advances made to the mortgagor; *It was held*, that the variance was immaterial. *Ibid.*

9. Where a mortgage is executed to secure a usurious note, the usury only affects the interest and does not impair the validity of the mortgage. *Ibid.*

10. Where the property conveyed in a mortgage was described as "one bay mule," when in fact it was a black mule, the property in the black mule will pass, if it is admitted or proved that the mule in controversy was the one really intended to be covered by the mortgage. *Harris* v. *Woodard*, 232.

11. Whenever it becomes necessary to identify the property conveyed in a mortgage from property of a similar kind, or to show what was intended to be conveyed, parol evidence is admissible. *Ibid.*

12. Where a party sold a mule, and retained title until the purchase money was paid, and afterwards took a mortgage on the same mule, and both in the sale note which recited that the title was retained, and in the mortgage, the mule was incorrectly described as a bay mule, when in fact it was a black one, and the mortgagor afterwards sold the mule, which was purchased from his vendee by the defendant; *It was held*, that the defendant, although acting in good faith, and in ignorance of the fact that it did not belong to his vendor, got no title. *Ibid.*

13. The rule as to what are fixtures is the same between vendor and vendee and mortgagor and mortgagee, and whatever would pass in an absolute sale to a vendee will pass as a security to a mortgagee. *Foote* v. *Gooch*, 265.

14. Where a mortgagor left in possession improves the mortgaged premises after the execution of the mortgage by the erection of new works and the introduction of new machinery, which are intended to be a permanent annexation to the freehold, he cannot remove such fixtures and thus impair the increased security, and it seems that this rule applies even to trade fixtures. *Ibid.*

15. The intent with which the annexation is made to the freehold enters largely into the question of the right to remove, and if the fixture is made for the purpose of permanently improving the freehold a mortgagor cannot remove it. *Ibid.*

16. Where one who knows of a prior unregistered deed of trust or mortgage procures a mortgage for his own benefit on the same property,

which is registered first, he gets the first lien on the property, unless he used fraud to prevent the registration of the mortgage which is first in date. *Bank* v. *M'f'g Co.*, 298.

17. Where a bond secured by a mortgage is surrendered and a new bond taken in its place, the new bond will be secured by the mortgage, unless it appears that an extinguishment of the debt was intended. *Ibid.*

18. Two corporations were under the same management, and one of them executed a mortgage on its property to secure a debt, and afterwards this debt was assumed by the other corporation, which executed a mortgage on its property to secure it, and the mortgage on the property of the original debtor corporation was cancelled. After the expiration of some time, the original debtor corporation again assumed the payment of this debt, executed a new mortgage to secure it, and the mortgage on the second corporation was cancelled; *It was held*, that under the provisions of our registration laws, as against creditors, the cancelled mortgages were inoperative, and the secured creditor could claim no liens or priorities under them. *Ibid.*

19. As a general rule in the construction of statutes, a *proviso* will be considered as a limitation upon the general words preceding, and as excepting something therefrom, but this rule is not absolute, and the meaning of the *proviso* will be ascertained by the language used in it. *Ibid.*

20. The provisions of Bat. Rev., ch. 25, §48, (*The Code*, §685,) apply to corporations generally, and are not restricted to those only formed by foreclosures under a deed of trust of an insolvent or expiring corporation. *Ibid.*

21. So, where a corporation made a mortgage for the purpose of securing bonds to raise money; *It was held*, that the debts owing by such corporation at the time the mortgage was executed were entitled to priority over the bonds secured by the mortgage. *Ibid.*

22. The act of 1879, which provides that mortgages executed by corporations on their property or earnings shall not exempt the property or earnings from executions for the satisfaction of a judgment obtained for labor performed, materials furnished, or for torts committed by such corporation, so far as it relates to labor and materials furnished, is only intended to more effectually secure the lien given by the Constitution and statutes to laborers and material-men, and was not intended to create a lien in favor of parties who furnish machinery, &c., to the corporation upon its personal credit. *Ibid.*

23. A mortgagee, after the death of the mortgagor, has a right to at once foreclose the mortgage against the heirs at law, and this without regard to the right of the heirs to have the mortgage debt paid out of the personal property of the decedent. *Fraser* v. *Bean*, 327.

24. The administrator is not a necessary party in an action by a mortgagee to foreclose a mortgage after the death of the mortgagor. *Ibid.*

25. An action to foreclose a mortgage, where no part of the mortgage debt has been paid and the mortgagor remains in possession, is barred in ten years from the forfeiture, and the same rule applies where the mortgagor died before the time expired and the action is brought against his heirs. *Ibid.*

26. The provisions of *The Code*, §152, par. 3, only bars an action to foreclose the mortgage, and does not bar an action to recover the debt secured by the mortgage. *Ibid.*

27. Where the heir successfully pleads the statute of limitation to an action brought to foreclose a mortgage executed by his ancestor, but a judgment for the debt is obtained against the administrator; *quære*, what will be the result of a proceeding by the administrator to sell the land to make assets to pay the judgment. *Ibid.*

28. Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action. *McNair* v. *Pope*, 502.

29. *Quære*, whether a deed executed by the executor of a deceased mortgagee, who undertook to sell the land in pursuance of the mortgage to his testator, would establish such apparent right, but when the purchaser at such sale also set up a release from the mortgagor he makes out an apparent title and is entitled to a receiver, although the release is attacked for fraud. *Ibid.*

MOTION IN THE CAUSE:

1. Where it is sought to set aside a judgment or decree on the ground of irregularity, a motion in the cause, and not a new action, is the appropriate remedy, although the action may be at an end. *Morris* v. *White*, 91.

2. Where the action is still pending, any relief against a judgment or decree rendered therein must be by a motion in the cause, and not by a new action. *Ibid.*

3. It is well settled, that a motion in the cause, and not a new action, is the proper remedy to set aside an irregular judgment, whether the irregularity appears on the face of the record or not, even although the action is at an end. It is otherwise when it is sought to attack a judgment for fraud, which must be done by a new action, if the action in which the judgment sought to be attacked is at an end. *Syme* v. *Trice*, 243.

MUNICIPAL CORPORATION:

1. A majority of the qualified voters and not merely of those voting, must vote in favor of the measure in order to allow a municipal corporation to pledge its faith, loan its credit or contract any debt, under the provisions of Art. 7, §7, of the Constitution. *Southerland* v. *Goldsboro*, 49; *Duke* v. *Brown*, 127.

2. To constitute a person a qualified voter within the meaning of the Constitution, his name must be entered on the registration book. *Ibid; Markham* v. *Manning*, 132.

3. Where there is an inherent constitutional defect in the statute authorizing the issue of municipal bonds, a purchaser of the bonds takes them with notice of their illegal origin, for purchasers must inquire into the authority by which the bonds are issued, and are held to notice of any defect therein. *Duke* v. *Brown*, 127.

4. The word "estate" has a broader meaning than the word "property." The latter word does not include choses in action, unless there be something in the context which would require it to receive this interpretation. *Vaughan* v. *Murfreesboro*, 317.

5. So where a statute allowed a municipal corporation to levy a tax upon all persons and property within the town; *It was held*, that this did not authorize a tax on solvent credits, money, or bonds. *Ibid.*

6. Where an excavation was allowed to remain open and unguarded in a town, which, however, was some distance from the sidewalk, and its existence and unprotected condition was well known to the plaintiff, who carelessly fell into it and was injured; *It was held*, that he could not recover. *Walker* v. *Reidsville*, 382.

7. Where the defendant executed his bond to a municipal corporation for a license tax, instead of paying cash, he is estopped from setting up as a defence that the municipal authorities had no power to take such bond, and issue the license, and consequently that the bond was void. *Hendersonville* v. *Price*, 423.

8. While the Board of Commissioners of a municipal corporation cannot issue a license to retail liquors for a longer period than one year, the time need not begin and terminate with the term of office of the Board which grants it, for they can grant a license which extends beyond their term of office, provided that it does not exceed one year, and does not begin to take effect after their term of office has expired. *Ibid.*

9. Where County Commissioners ascertain and declare the result of an election, their action and declaration cannot be attacked collaterally, but it may by a direct proceeding for that purpose. *McDowell* v. *Cons. Co.*, 514.

10. The validity or invalidity of an election may be tested by an action, although it is alleged that innocent persons have acquired rights under the election as declared by the proper authorities. Such alleged innocent parties, although parties to the action, are not precluded by a judgment declaring the election void, but their rights must be tested by actions prosecuted for that purpose. *Goforth* v. *Cons. Co.*, 535.

11. Where the question of subscription to two different railway corporations is to be submitted to a vote, it is improper and irregular to submit them as a single proposition at the same election and on the same ballot. *Ibid.*

NAVIGABLE WATER:

The State can only grant land under navigable water for wharf purposes, and county commissioners have no power to confer upon a party a right to build a wharf upon such land for the purpose of a public road. *Gregory* v. *Forbes*, 77.

NEGLIGENCE:

1. Where a party is injured by the want of ordinary care and diligence in another, but the party injured does not use reasonable care and diligence himself, he cannot recover. *Walker* v. *Reidsville*, 382.

2. If the injured party, although not entirely free from fault, could not by ordinary care and prudence have avoided the danger, caused by the careless and negligent conduct of the defendant, he can recover damages for the injury. *Ibid.*

3. So, if the negligence of the defendant was the immediate cause of the injury, and that of the plaintiff was remote, such remote contributory negligence would not bar a recovery. *Ibid.*

4. Where an excavation was allowed to remain open and unguarded in a town, which, however, was some distance from the sidewalk, and its existence and unprotected condition was well known to the plaintiff, who carelessly fell into it and was injured; *It was held*, that he could not recover. *Ibid.*

5. In an action for damages for an injury caused by the negligence of the defendant, where the defence is contributory negligence, it is sometimes proper to submit two issues, one as to the negligence of the defendant, and the other as to the contributory negligence of the plaintiff, yet when the action of both has contributed to the injury, it is allowable to submit an issue only as to the defendant's negligence, with instructions to find that in the negative, if the jury believe that the plaintiff's conduct contributed to the injury. *Scott* v. *R. R. Co.*, 428.

6. It is not *per se* negligence for the plaintiff to have driven his vehicle near one edge of a street approaching a railroad, although he could have obtained a better view of the track from the middle of the street. *Ibid.*

7. It is not error for the trial Judge to refuse to charge that certain acts or omissions of the plaintiff amount to contributory negligence, when the evidence in regard to them is conflicting. *Ibid.*

8. Where the plaintiff was injured at a point where the railroad track crossed the street, it is not *per se* negligence that he might have seen the moving cars at another crossing, where there were several tracks, and the evidence was conflicting as to whether he could have discovered that the cars were on the track which led to the crossing which he was approaching. *Ibid.*

9. One who is injured by jumping from a moving train is generally barred of a recovery by reason of his contributory negligence, but where a servant was ordered by his superior to do so in order to perform a duty for the company, it not appearing to the servant at the time that obedience would certainly cause injury; *It was held*, that there was no such contributory negligence as would prevent a recovery. *Patton* v. *R. R. Co.*, 455.

NEGOTIABLE INSTRUMENTS:

1. The bare possession of a bond or note, unendorsed, by a stranger, does not raise a presumption that it is the property of the person having possession. *Thompson* v. *Onley*, 9.

2. To give title to a note or bond an endorsement or assignment is not necessary. *Ibid.*

3. A written instrument whereby a party promises to pay the party therein named a sum certain at a time specified therein is a promissory note in this State, although it be under seal. *Bank* v. *Michael*, 53.

4. A bond payable to the order of the obligee, which recites the particular consideration for which it was given, as for the purchase money for a tract of land, is a negotiable instrument, and a purchaser for value, before maturity and without notice, takes it discharged of any equities between the original parties to it. *Ibid.*

5. To render a note unnegotiable it must show on its face that the promise to pay is conditional, and renders the amount to be paid uncertain. *Ibid.*

6. The defendant executed his bond to the order of the payee, which bond recited that it was given for the purchase money for a tract of land, and the payee endorsed it to the plaintiff before maturity. After the endorsement the obligor paid the amount due to the payee, who mis-

applied it; and *It was held*, that the bond was a negotiable instrument, and plaintiff being an endorsee without notice and before maturity, was entitled to recover. *Ibid.*

7. If, in such case, the bond had not been endorsed by the payee, and had been paid and discharged by the obligor before its delivery to the plaintiff, he could not have recovered. *Ibid.*

NEW ACTION:

1. Where it is sought to set aside a judgment or decree on the ground of irregularity, a motion in the cause, and not a new action, is the appropriate remedy, although the action may be at an end. *Morris* v. *White*, 91.

2. Where the action is still pending, any relief against a judgment or decree rendered therein, must be by a motion in the cause, and not be a new action. *Ibid.*

3. Where parties are required by a decree to execute a conveyance for certain land upon their coming of age, the action is pending until the conveyance is executed. *Ibid.*

4. It is well settled, that a motion in the cause, and not a new action, is the proper remedy to set aside an irregular judgment, whether the irregularity appears on the face of the record or not, even although the action is at an end. It is otherwise when it is sought to attack a judgment for fraud, which must be done by a new action, if the action in which the judgment sought to be attacked is at an end. *Syme* v. *Trice*, 243.

5. Where an agreement to submit the matters in controversy in a pending action is made out of Court, and no order of Court is made to make the award when filed a rule of Court, the Court has no power to enter a judgment on the award, but the remedy is by a new action on the award. *Jackson* v. *McLean*, 474.

NEW TRIAL:

Where an action was brought for a tract of land describing it as a whole, and incompetent evidence was admitted which related only to a part, the judgment of the Supreme Court will be for a *venire de novo* generally, and it will not grant a new trial only as to that portion of the land affected by the incompetent evidence. *Beam* v. *Jennings*, 82.

NEXT FRIEND:

1. The guardian or next friend of an infant is not, properly speaking, a party to the action, although his name appears in the record. *Tate* v. *Mott*, 19.

2. The next friend of an infant ought always to be appointed by the Court, and really he is an officer of the Court, and under its supervision and control. *Ibid.*

3. The Court has power, for good cause shown, to remove the next friend of an infant litigant, and appoint another as often as may be necessary. *Ibid.*

4. It is not essential that the infant should know that an action has been brought in his favor by a next friend, as his incapacity to judge for himself is presumed, but the Court may inquire into the propriety of the action and take such steps as may be necessary. *Ibid.*

5. Where an infant sues by a next friend he is as much bound by the judgment as an adult, and this rule applies to non-resident as much as to rasident infants. *Ibid.*

6. A judgment for or against an infant, when he appears by attorney, but has no guardian or next friend, is not void, but only voidable. *Ibid.*

7. A guardian appointed in another State has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian it will be treated as if he were next friend. *Ibid.*

NO EVIDENCE:

1. Where the answer alleged as a counter-claim, that the note sued on was endorsed to the plaintiff after maturity, and that the endorser was indebted to the defendant before the transfer of the note, for money paid by him as his surety, and the evidence offered to support it was a joint and several note, executed by the defendant and another party, who it was alleged was the agent of the endorser of the plaintiff, but nothing in the note offered in evidence showed any agency; *It was held*, a failure of proof, and the Court below properly charged the jury that there was no evidence to support the allegation of the counter-claim. *Smith* v. *McGregor*, 101.

2. Where evidence only creates a vague impression of a fact, it should not be permitted to go to the jury. *Ibid.*

3. Evidence that the plaintiff asked payment of a debt from the defendant, and that the defendant acknowledged that he owed something, and gave the plaintiff some property to be applied to the debt, which was entered as a credit on the bond sued on, is some evidence, taken with other circumstancess to rebut the presumption of payment from the lapse of time, although there is no evidence that at the time plaintiff was the owner of the bond sued on. *White* v. *Beaman*, 122.

4. Where the evidence was that a grandchild resided with her grandfather as a member of his family, and did household work for him, and he declared several times that he intended to give her a part of his property as he would his children, and that she should be paid for the ser-

vices she rendered him; *It was held*, no sufficient evidence to go to the jury to prove a promise on the part of the grandfather to pay her for her services. *Dodson* v. *McAdams*, 149.

5. Where a preliminary question of fact arises, upon which the admissibility of evidence depends, the finding of the Judge cannot be reviewed on appeal, if there be any evidence to warrant it. *Smith* v. *Kron*, 392.

NOTICE:

1. If property is transferred by the defendant pending a suit involving its title, in which there is afterwards a judgment for the plaintiff, the judgment relates to the beginning of the action and binds the property in the hands of the purchaser, and when the transaction and suit are in the same county and the record furnishes evidence of the claim, this rule is not affected by the provisions of *The Code*, §229. *Dancy* v. *Duncan*, 111.

2. Where a party unites with a trustee in a breach of trust, or there are circumstances to put him on his guard and awaken suspicion, he will be required to repay to the trust fund any of its assets which he may have received in consequence of the breach of trust. *Ibid.*

3. Where there is an inherent constitutional defect in the statute authorizing the issue of municipal bonds, a purchaser of the bonds takes them with notice of their illegal origin, for purchasers must inquire into the authority by which the bonds are issued, and are held to notice of any defect therein. *Duke* v. *Brown*, 127.

4. Actual possession of land is notice to the world of any equity of the occupant. *Mayo* v. *Leggett*, 237.

5. Land was conveyed to a trustee to secure debts, and afterwards a third party took a conveyance of the equity of redemption and paid off the debts and then sold the land to a person who took possession. The vendor then caused the trustee to sell the land under the terms of the deed, in order to get the legal title out of him; *It was held*, that a purchaser at such sale, with full notice of the facts, got no title, and no estoppel arose against the owner of the equity. *Ibid.*

6. Where a devisee or heir at law sells land derived from the devisor or ancestor more than two years after the issuing of letters testamentary, &c., to a *bona fide* purchaser for value and without notice, such purchaser gets a good title against the creditors of the devisor or ancestor, but the devisee or heir holds the price received for the land in *lieu* thereof and subject to the claims of such creditors just as the land would have been. *Davis* v. *Perry*, 260.

7. A purchaser from an heir or devisee with notice, although after two years, holds the land subject to the claims of the creditors of the devisor or ancestor. *Ibid.*

NOTICE TO QUIT:

1. One let into possession of land under a contract to purchase, is an occupant at the will of the vendor, and he so continues until the purchase money is paid. *Allen* v. *Taylor*, 37.
2. In such case, the vendor may, after reasonable notice to quit, demand possession, and if the possession is not surrendered, he may bring his action at once. *Ibid.*
3. What is reasonable notice to quit will depend on the circumstances of each case. *Ibid.*

NUISANCE:

1. Where it appeared by the affidavit of two physicians that a sewer used by the defendant was dangerous to the health of the plaintiffs; *It was held*, no error to continue the injunction against its use to the hearing. *Evans* v. *The Railroad*, 45.
2. In such case, it is immaterial that the sewer is also used by others. *Ibid.*

OFFICE:

1. Qualification is as essential as election to the right to hold office, for the right of one elected to an office to be inducted, is in subordination to the Constitution, and the officer must possess the constitutional qualifications, before he can fill the office. *Hannon* v. *Grizzard*, 293.
2. The result of the vote is conclusively settled, so far as the Board of County Commissioners are concerned, by the certificate of the Board of Canvassers. *Ibid.*
3. It is reasonable to presume and to act upon the presumption, that a person chosen by the electors is qualified to hold the office, but if the Commissioners are satisfied, or have reasonable grounds to believe, that the person elected is disqualified by the Constitution from holding the office, they are not required to induct him. *Ibid.*
4. So where a person was elected to an office, but the Commissioners, acting in entire good faith, refused to induct him, on the ground that he was disqualified under the Constitution from holding the office, but upon a suit instituted to try the title to the office it was adjudged that he was qualified; *It was held*, that an action would not lie against the Commissioners to recover damages for the profits of the office, lost by their refusal to induct. *Ibid.*
5. If the action of the Commissioners in such case had been prompted by malice, or to accomplish any unlawful end, the action would lie. *Ibid.*
6. Whether the duty of the County Commissioners of inducting persons who have received a certificate of election into office, is merely ministerial or not; *Quære*, but if the commissioners refuse to induct one

who is plainly ineligible, the Courts will not compel them to do so, and thus put one into an office which he cannot constitutionally hold. *McNeill* v. *Somers*, 467.

7. The right given by the statute to a sheriff to collect the taxes for which he is accountable, after he has gone out of office, does not bring him within the inhibition of Art. 14, §7, of the Constitution, so as to render him ineligible to hold another office. *Ibid.*

8. Where the statute imposes certain duties to be performed by an officer after the expiration of the term of office, their performance does not constitute a place or office of trust or profit so as to disqualify the former officer from holding another office at the same time. *Ibid.*

OFFICIAL BONDS:

1. The effect of the Acts of the General Assembly of 1883 and 1885 in relation to a graded school in Edenton, was to supersede the organization of the school district within the same territory, and confer all the powers theretofore exercised by the school committee under the general law and transfer all moneys then in the treasury to the trustees created by said special enactments. *Skinner* v. *Bateman*, 5.

2. The school committee for the superseded district had no authority to contract or give orders for the payment for teaching a school therein after the passage of the Acts of 1883 and 1885; and it was no breach of the county treasurer's bond to refuse to pay upon their order, although at the time he had moneys in his hands apportioned originally to said district. *Ibid.*

PARENT AND CHILD:

1. If a grandparent receives his grandchild into his family as a member of it, they stand in the relation of parent and child, and no presumption is raised of a promise on the part of the grandparent to pay the grandchild for services rendered such as a child generally renders as a member of the family. *Dodson* v. *McAdams*, 149.

2. The presumption against the promise of the grandparent to pay for services in such case, may be overcome by evidence of an express promise on his part to pay for such services. *Ibid.*

3. Where the evidence was that a grandchild resided with her grandfather as a member of his family, and did household work for him, and he declared several times that he intended to give her a part of his property as he would his children, and that she should be paid for the services she rendered him; *It was held*, no sufficient evidence to go to the jury to prove a promise on the part of the grandfather to pay her for her services. *Ibid.*

4. The services of a child to its parent, or of a grandchild to whom the grandparent stands *in loco parentis* to such grandparent, are not gratuitous, but are presumed in the absence of evidence of an express promise, to be rendered as a recompense for the care and protection extended to the child. *Ibid.*

PARTIAL PAYMENT:

1. The effect of §172 of *The Code* is to leave the law as it was prior to the adoption of the Code of Civil Procedure as regards the effect of a partial payment in removing the bar of the statute of limitations. *Bank* v. *Harris*, 118.

2. The fact that the maker of a note has a claim against the holder, which the holder endorses as a credit on the note without the assent of the maker, will not be such a partial payment as will rebut the statute of limitations, but an agreement to apply one existing liability to another is such a partial payment as will stop the operation of the statute, although the endorsement is never actually made on the note. *Ibid.*

PARTIES:

1. The provision of *The Code*, §272, authorizing the Court to direct a division of improperly joined *causes* of action, does not extend to the cases where there is also a misjoinder of *parties* to the action. *Mitchell* v. *Mitchell*, 14.

2. The guardian or next friend of an infant is not, properly speaking, a party to the action, although his name appears in the record. *Tate* v. *Mott*, 19.

3. Where four copartners joined in a note to purchase property for the partnership account, and after the dissolution of the firm the plaintiff paid more than his proportion of the note and brought suit against the defendant for contribution; *It was held*, that the other partners were not necessary parties where they were all insolvent, one of them dead with no representative, and another a non-resident of the State. *Scott* v. *Bryan*, 289.

4. An administrator is not a necessary party to an action by a mortgagee to foreclose the mortgage after the death of the mortgagor. *Fraser* v. *Bean*, 327.

5. Where the answer asks that new parties be made, this will not be done when taking the answer as true; such party would have no ground on which to resist the plaintiff's claim. *Morehead* v. *The R. R. Co.*, 362.

6. The Court has no power, except by consent, to allow amendments either in respect to parties or the cause of action, which will make substantially a new action, as this would not be to allow an amendment, but to substitute a new action for the one pending. *Clendenin* v. *Turner*, 416.

7. Where no members of a class to whom a conditional limitation is limited are *in esse*, a proceeding for partition, to which all of the parties in interest who are *in esse* are parties, will not give them a fee simple. *Overman* v. *Sims*, 451.

8. Where land is given to a trustee to hold on various trusts, and after the death of the trustee an action is brought to construe the trusts and enforce the provisions of the deed, the Court cannot decree a conveyance of the legal estate unless all of the heirs of the trustee are parties. *Graves* v. *Trueblood*, 495.

9. One who has the right of possession of an equitable estate in land may maintain an action for the possession. *Ibid.*

PARTITION:

1. Where non-resident infant tenants in common filed an *ex parte* petition to sell land for partition, by their guardian, who was a non-resident; *It was held*, that the decree of sale was not void, and could not be attacked collaterally. *Tate* v. *Mott*, 19.

2. In a petition for partition, an allegation that the defendant has an estate in a certain number of acres of said land, is insufficient, as it would indicate that the defendant has a several estate in that number of acres. *Baum* v. *The Shooting Club*, 310.

3. Where no members of a class to whom a conditional limitation is limited are *in esse*, a proceeding for partition to which all of the parties in interest who are *in esse* are parties, will not give them a fee simple. *Overman* v. *Sims*, 451.

4. Land was conveyed to T T and his heirs, to hold for the use of M T for her life, and at her death to such child or children, and the representatives of such, as she shall have by T T living at her death, and their heirs forever. M T had two children by T T living, but such children had no issue; *Held*, that M T and her children by T T could not convey a fee simple in the land, and the fact that the land had been divided by a proceeding for partition did not cure the defect. *Ibid.*

PARTNERSHIP:

1. Where four copartners joined in a note to purchase property for the partnership account, and after the dissolution of the firm, the plaintiff paid more than his proportion of the note, and brought suit against the defendant for contribution; *It was held*, that the other partners were not necessary parties where they were all insolvent, one of them dead with no representative, and another a non-resident of the State. *Scott* v. *Bryan*, 289.

2. Where one partner pays more than his share towards a partnership debt, he can only recover from his copartner one half of the excess paid. *Ibid.*

PAYMENT:

Evidence that the plaintiff asked payment of a debt from the defendant, and that the defendant acknowledged that he owed something, and gave the plaintiff some property to be applied to the debt, which was entered as a credit on the bond sued on, is some evidence, taken with other circumstances, to rebut the presumption of payment from the lapse of time, although there is no evidence that at the time plaintiff was the owner of the bond sued on. *White* v. *Beaman*, 122.

PENDING ACTION:

1. Where the action is still pending, any relief against a judgment or decree rendered therein must be by a motion in the cause, and not be a new action. *Morris* v. *White*, 91.

2. Where parties are required by a decree to execute a conveyance for certain land upon their coming of age, the action is pending until the conveyance is executed. *Ibid.*

3. Where the pendency of another action, and a judgment therein which disposes of the subject-matter of the controversy in the new suit, is not regularly pleaded, but is taken advantage of by an exception, the informality is such that this Court will not pass on the question, but will remand the case, that the fact may be regularly ascertained. *Holley* v. *Holley*, 229.

4. It is well settled, that a motion in the cause, and not a new action, is the proper remedy to set aside an irregular judgment, whether the irregularity appears on the face of the record or not, even although the action is at an end. It is otherwise when it is sought to attack a judgment for fraud, which must be done by a new action, if the action in which the judgment sought to be attacked is at an end. *Syme* v. *Trice*, 243.

PLEADING:

1. A counter-claim which only alleges that the plaintiff is indebted to the defendant, without alleging further the nature and kind of such indebtedness, and how it arose, is imperfectly pleaded, and ought to be disregarded, and in such case a bill of particulars affixed to the pleadings as a part of it does not aid it. *Smith* v. *McGregor*, 101.

2. When the pleadings are so confused and vague as to leave it in doubt what the parties are contending over, this Court will not take cognizance of the cause on appeal. *Woodlief* v. *Merritt*, 226.

3. Where the pendency of another action, and a judgment therein which disposes of the subject-matter of the controversy in the new suit, is not regularly pleaded, but is taken advantage of by an exception, the informality is such that this Court will not pass on the question, but will remand the case, that the fact may be regularly ascertained. *Holley* v. *Holley*, 229.

4. In actions for defamation under the former system of pleading, evidence offered to sustain a plea of the general issue could not be considered in mitigation of damages, but this has been changed by *The Code*, §266. *Knott* v. *Burwell*, 272.

POSSESSION:

1. Where land is left to a trustee to receive the profits and pay them over to one person during his life, and after his death to convey the legal estate to certain remainder-men, one of the remainder-men cannot get a possession adverse to the trustee and his co-remainder-men by taking possession under a deed from the person entitled to receive the rents for life. Such possession does not become adverse until after the death of the person entitled to the rents for life. *Hicks* v. *Bullock*, 164.

2. An adverse possession for twenty years by one tenant in common is necessary to bar his co-tenants. *Ibid.*

3. Actual possession of land is notice to the world of any equity of the occupant. *Mayo* v. *Leggett*, 237.

4. Land was conveyed to a trustee to secure debts, and afterwards a third party took a conveyance of the equity of redemption and paid off the debts, and then sold the land to a person who took possession. The vendor then caused the trustee to sell the land under the terms of the deed, in order to get the legal title out of him; *It was held*, that a purchaser at such sale, with full notice of the facts, got no title, and no estoppel arose against the owner of the equity. *Ibid.*

5. Where a trust is created by the agreement of the parties, no length of time will bar the *cestui que trust*, for the possession of the trustee cannot be adverse, unless the trustee repudiate the trust by clear and unequivocal acts or words brought to the notice of the *cestui que trust*, but when it is sought to convert a party who has the legal title into a trustee by a decree, he may insist that his possession was adverse, and be protected by the statute of limitations. *University* v. *The Bank*, 280.

6. So where an express trustee conveys the trust property, in breach of the trust, and his grantee continues to hold adversely, the statute will run in his favor. *Ibid.*

7. Exercising such a dominion of land, and making that use of it, to which it is capable of being put in its then state, such acts to be so repeated as to show that they are done in the character of owner, is a possession of land, as distinguished from mere trespasses. *Baum* v. *The Shooting Club*, 310.

8. Where the land in question was directly on the ocean, and had been incapable of cultivation for a long period, and there was evidence that the plaintiffs and those under whom they claimed had cultivated a

part of the land as long as it was fit for that purpose, and subsequently had used it in the only way in which it was capable of being used, by grazing cattle on it, and renting it out to shooters; *It was held*, some evidence of possession to go to the jury. *Ibid.*

9. Possession alone does not constitute such a seizin as is necessary to support a claim for dower. *Efland* v. *Efland*, 488.

10. Where land was purchased and paid for by the husband, but the deed was made to a third party in order to defraud the creditors of the husband, he has no such seizin as will support a claim for dower on the part of his widow, although he was in possession of the land; but where land of which the husband was seized during coverture was sold at execution sale, and purchased by a third party with the money of the husband, and the title was made to the purchaser, with a like intent to defraud, the wife is entitled to dower. *Ibid.*

POWER OF ATTORNEY:

A power of attorney appointing an agent to wind up certain business of the non-resident principal does not authorize the agent to borrow money on his account. *Smith* v. *McGregor*, 101.

POWERS:

1. While a wife may execute a power of appointmeut conferred upon her in favor of her husband, yet she cannot convey her land directly to him, except as allowed by *The Code*, §§1835, 1836. *Sims* v. *Ray*, 87.

2. An estate settled on a *feme covert* for life, with a power of appointment at her death in fee, does not give her such an estate as will entitle the husband to curtesy if she fails to appoint. *Graves* v. *Trueblood*, 495.

3. Where an estate is settled on one for life, with a power to appoint in fee by writing, to take effect after her death, and in case of a failure to appoint, then to the heirs of the donee for life, the word heirs does not come within the provisions of the Rev. Code, ch. 43, §5, so as to be interpreted children. *Ibid.*

4. Where land is given to a trustee to hold on various trusts, and after the death of the trustee an action is brought to construe the trusts and enforce the provisions of the deed, the Court cannot decree a conveyance of the legal estate unless all of the heirs of the trustee are parties. *Ibid.*

PRIVY EXAMINATION:

1. Where a husband and wife joined in a bond to convey a tract of land to the defendant, but the wife was not privily examined, and after the death of the husband she received payment for the land and invested the money in other land; *It was held*, that she was estopped from tak-

ing advantage of the want of a privy examination, and therefore was not entitled to dower in the land sold by her husband. *Hodges* v. *Powell*, 64.

2. The privy examination of a *feme covert* which sets out that she signed the deed of her own free will and accord, and without any compulsion of her husband, is sufficient, without adding the words, "and doth voluntarily assent thereto." *Robbins* v. *Harris*, 557.

3. Where under the old system, it appeared that an order was made appointing a justice of the peace to take a privy examination, it will be presumed that the justice was a member of the County Court appointed for that purpose. *Ibid.*

PROCESS:

1. The clerk only acts ministerially in issuing the process for attachment. *Evans* v. *Etheridge*, 42.

2. In the absence of statutory regulation, a party is only prohibited from acting in his own case, when he exercises some judicial, as distingnished from a ministerial, office. *Ibid.*

3. A clerk of the Superior Court, upon making the necessary affidavit before some person authorized by law, may issue a warrant of attachment in an action in which he is plaintiff. *Ibid.*

4. It has been the practice in this State for clerks to issue process either for or against themselves. *Ibid.*

5. Where an adult was served with process in a cause, but filed no answer, and made no objection to any of the orders and decrees until three and a half years after they were passed, and then showed no injury to have resulted to her from the decrees; *It was held*, that they would not be set aside at her instance. *Syme* v. *Trice*, 243.

6. A judgment against an infant who has been served with process is not void, but at most is only irregular and voidable. *Ibid.*

7. Courts obtain jurisdiction over infant defendants over fourteen years old exactly in the same manner in which they do over adults, but if the infant is under fourteen, besides serving them personally and leaving a copy with them, a copy of the summons must also be delivered to the father, mother, or guardian, or if there is none in this State, then to the person who has the care and control of the infant, and in the case of non-resident infants, by publication as in other cases. *Ward* v. *Lowndes*, 367.

PROCESSIONING:

Where the rights of parties have been once judicially determined, it is irregular and improper to attempt to do away with the effect of the judgment by attempting to try the same right in a different way. *Holley* v. *Holley*, 229.

PROFITS:

1. Where the plaintiff's business has been broken up by the wrongful act of the defendant he can recover in damages the profits on contracts which were actually made, and which he was prevented from completing by such wrongful act, but he cannot recover the possible profits which his business would have yielded if not interfered with, as this damage is speculative and remote. *Jones* v. *Call*, 337.

2. So where the plaintiff was a manufacturer of patent tobacco machines and was stopped from such manufacture by the wrongful act of the defendant, and at the time of such stoppage the plaintiff had contracts for machines which would have yielded a profit of $1,700, and the referee found that the business which was broken up was worth $6,000 a year; *It was held*, that the measure of damages was the profit on the machines contracted for, and the estimated profit of the business was too speculative and remote to constitute the measure of damages. *Ibid.*

PROMISSORY NOTES:

(See NEGOTIABLE INSTRUMENTS.)

PROVISO:

As a general rule in the construction of statutes, a *proviso* will be considered as a limitation upon the general words preceding, and as excepting something therefrom, but this rule is not absolute, and the meaning of the *proviso* will be ascertained by the language used in it. *Bank* v. *M'f'g Co.*, 298.

PUBLIC SECURITIES:

Public securities, such as State bonds, may be converted by returning them under an assertion of a right to hold them in defiance of the true owner, as well as other property. *University* v. *The Bank*, 280.

QUALIFIED VOTER:

1. A majority of the qualified voters and not merely of those voting, must vote in favor of the measure in order to allow a municipal corporation to pledge its faith, loan its credit or contract any debt, under the provisions of Art. 7, §7, of the Constitution. *Southerland* v. *Goldsboro*, 49; *Duke* v. *Brown*, 127; *Markham* v. *Manning*, 132.

2. To constitute a person a qualified voter within the meaning of the Constitution, his name must be entered on the registration book. *Ibid.*

3. The registration books are *prima facie* evidence of the number of qualified voters in a town, but they are open for correction on account of deaths, &c., and *perhaps* for intrinsic disqualifications and errors in admitting persons to register. *Duke* v. *Brown*, 127.

4. The ruling heretofore made in *Southerland* v. *Goldsboro*, ante, 49, and *Duke* v. *Brown*, ante, 127, in regard to the meaning of the term "qualified voters," as used in Art. 7, §7, of the Constitution, affirmed. *McDowell* v. *Cons. Co.*, 514.

5. Before an election is held, opportunity must be given to all persons entitled to become qualified voters to register, and if this opportunity is denied either purposely or by accident, it may vitiate the election, and will certainly do so if such denial should materially affect the result. *Ibid; Goforth* v. *Cons. Co.*, 535.

RAILROADS:

1. A contract with a railroad company to carry freight from a place within this State to a place within another State at a fixed price for the entire route, the price thus charged being greater than that required from others for same service, is not embraced by the provisions of §1966 of *The Code*. *McLean* v. *The Railroad*, 1.

2. Such a contract is also a matter affecting interstate commerce, the control of which is vested exclusively in Congress. *Ibid.*

3. The bill of lading issued by a common carrier only determines the conditions upon which the freight is to be transported after it passes under its control, and it does not abrogate or annul any contract made by the common carrier before it was issued in regard to receiving and forwarding the freight. *Hamilton* v. *R. R.*, 398.

4. So where the agent of a railroad company agreed to have cars ready to receive freight and to forward it on a certain day, but the carrier failed to have the cars ready and to forward it, such contract is not abrogated by the terms of bill of lading issued when the freight was shipped on a subsequent day. *Ibid.*

5. Where the carrier is informed of the special circumstances making it advantageous to the plaintiff to get his produce to a certain market on a certain day, and agrees to furnish cars to be loaded in time to be forwarded to such market by that day, which contract he fails to perform, the plaintiff is entitled to recover such special damages as actually result from a failure to get the produce to the market on that day. *Ibid.*

6. Where the plaintiff had a right to use a road which ran over the right of way of a railroad corporation, the corporation has no right to obstruct such road, when such obstructions were not necessary for purposes of the corporation. *Willey* v. *R. R. Co.*, 408.

7. It is not *per se* negligence for the plaintiff to have driven his vehicle near one edge of a street approaching a railroad, although he could have obtained a better view of the track from the middle of the street. *Scott* v. *R. R. Co.*, 428.

8. Where the plaintiff was injured at a point where the railroad track crossed the street, it is not *per se* negligence that he might have seen the moving cars at another crossing where there were several tracks, and the evidence was conflicting as to whether he could have discovered that the cars were on the track which led to the crossing which he was approaching. *Ibid.*

9. Where the common master invests one of his employees with the power to hire, discharge, command and direct the other employees, the master is liable for his acts, and he is not a fellow-servant, although he works as any other servant and there is nothing in the nature of the employment to show an authority to charge the common master. *Patton* v. *R. R. Co.*, 455.

10. So, while there may be nothing in the nature of the employment of a section master on a railroad to charge the master with responsibility for his acts towards his co-laborers, yet if the master gives him authority to command, discharge and employ the laborers, the common master is liable for his misfeasance towards his fellow-laborers in the exercise of the authority so conferred. *Ibid.*

11. One who is injured by jumping from a moving train is generally barred of a recovery by reason of his contributory negligence, but where a servant was ordered by his superior to do so in order to perform a duty for the company, it not appearing to the servant at the time that obedience would certainly cause injury; *It was held*, that there was no such contributory negligence as would prevent a recovery. *Ibid.*

12. Where the question of subscription to two different railway corporations is to be submitted to a vote, it is improper and irregular to submit them as a single proposition, at the same election and on the same ballot. *Goforth* v. *Cons. Co.*, 535.

RECEIVER:

1. Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action. *McNair* v. *Pope*, 502.

2. *Quære*, whether a deed executed by the executor of a deceased mortgagee, who undertook to sell the land in pursuance of the mortgage to his testator, would establish such apparent right; but when the purchaser at such sale also sets up a release from the mortgagor he makes out an apparent title and is entitled to a receiver, although the release is attacked for fraud. *Ibid.*

RECITALS IN A JUDGMENT:

The recitals in a final judgment cannot change the force and effect of an order made in a previous stage of the action. *Jackson* v. *McLean*, 474.

RECORDS:

1. Records of other States to be used in evidence in this State, must have the attestation of the clerk of the Court whose record is offered, and the seal of the Court, if it have one. If there be no seal, this fact must appear in the certificate of the clerk; and the Judge, Chief Justice, or presiding magistrate of such Court, must certify that the record is properly attested. *Kinsley* v. *Rumbough*, 193.

2. In such case, it is not necessary that the Governor of the State should certify under the great seal of the State to the official character of the Judge who makes the certificate, nor that the clerk should make such certificate, under his official seal. The provisions of §906 of the Revised Statutes of the United States do not apply to records of Courts and judicial proceedings. *Ibid.*

REFERENCE:

1. While a defendant has the right to have a plea in bar passed on by a jury before an account is ordered, yet he may waive the right to have it passed on by a jury at all, and by consenting to a reference he waives this right. *Grant* v. *Hughes*, 177.

2. Where an order of reference is made without objection or opposition it is equivalent to consent and is a waiver of the right to have the issue tried by a jury. *Ibid.*

3. *It seems* that an appeal will lie from an order of reference, where there is an undisposed of plea in bar, and the defendant objects to the reference on that ground. *Ibid.*

4. Where an appeal is taken to this Court from the action of a Judge in passing upon exceptions to the report of a referee, exceptions should be taken and stated in the record to the rulings of the Judge which it is sought to have reviewed, and the case ought not to be sent to this Court to be heard only on the exceptions taken to the ruling of the referee. *Bank* v. *M'f'g Co.*, 298.

5. Where an order is made recommitting a report to a referee with directions to reform it in the particulars set out in the order, to which no exception is made, the complaining party cannot except to the report as reformed in the manner directed, and thus review the order of re-reference, but he must except to the order itself at the time it is made. *Cowles* v. *Curry*, 331.

6. This Court cannot consider exceptions to the findings of a referee which depend upon the evidence when no evidence is sent up with the transcript. *Jones* v. *Call*, 337.

7. Where in the trial of an action before a referee the defendant puts his defence on one point which is sustained by the referee, he cannot ask to have other defences tried, not raised before the referee, when the conclusions of the referee have been reversed. *Wiley* v. *Logan*, 510.

8. So, in an action against the defendant for failing to account for notes put into his hands for collection, the referee ruled that the action could not be maintained for want of a demand, which ruling was sustained by the Superior Court, but sufficient facts were found by the referee to warrant a judgment, the question of demand being removed; *It was held*, that upon reversing the judgment in the Supreme Court the defendant was not entitled to have the case retried on the issue as to whether he had ever received the claims or not. *Ibid.*

REGISTRATION:

1. Where one who knows of a prior unregistered deed of trust or mortgage procures a mortgage for his own benefit on the same property, which is registered first, he gets the first lien on the property, unless he used fraud to prevent the registration of the mortgage which is first in date. *Bank* v. *M'f'g Co.*, 298.

2. Two corporations were under the same management, and one of them executed a mortgage on its property to secure a debt, and afterwards this debt was assumed by the other corporation, which executed a mortgage on its property to secure it, and the mortgage on the property of the original debtor corporation was cancelled. After the expiration of some time, the original debtor corporation again assumed the payment of this debt, executed a new mortgage to secure it, and the mortgage on the second corporation was cancelled; *It was held*, that under the provisions of our registration laws, as against creditors, the cancelled mortgages were inoperative, and the secured creditor could claim no liens or priorities under them. *Ibid.*

(See also "PRIVY EXAMINATION.")

REGISTRATION BOOKS:

1. Only those persons whose names appear on the registration books are qualified voters, within the meaning of Art. 7, §7, of the Constitution. *Southerland* v. *Goldsboro*, 49; *Duke* v. *Brown*, 127; *Markham* v. *Manning*, 132.

2. The registration books are *prima facie* evidence of the number of qualified voters in a town, but they are open for correction on account of deaths, &c., and *perhaps* for intrinsic disqualifications and errors in admitting persons to register. *Ibid.*

3. Before an election is held, opportunity must be given to all persons entitled to become qualified voters to register, and if this opportunity is denied, either purposely or by accident, it may vitiate the election, and will certainly do so, if such denial should materially affect the result. *McDowell* v. *Cons. Co.*, 514; *Goforth* v. *Cons. Co.*, 535.

RENTS:

1. Where by will land is devised to a trustee, to rent the land and pay the rents over to a person during his life, the *cestui que trust* takes no estate in the land, but only the right to have the rents paid to him. *Hicks* v. *Bullock*, 164.

2. Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action. *McNair* v. *Pope*, 502.

3. *Quære*, whether a deed executed by the executor of a deceased mortgagee, who undertook to sell the land in pursuance of the mortgage to his testator, would establish such apparent right; but when the purchaser at such sale also sets up a release from the mortgagor, he makes out an apparent title, and is entitled to a receiver, although the release is attacked for fraud. *Ibid.*

RES JUDICATA:

1. Where the rights of parties have been once judicially determined, it is irregular and improper to attempt to do away with the effect of the judgment by attempting to try the same right in a different way. *Holley* v. *Holley*, 229.

2. Where the title to a tract of land has been passed upon in one action the losing party cannot re-open the question by a proceeding to have the land processioned. *Ibid.*

RESULTING TRUSTS:

1. While trusts, unless annexed as an incident to a conveyance of the legal estate, cannot be raised by parol even when founded on a valuable consideration, they may be attached by agreement to such transferred estate and will be enforced. *Cade* v. *Davis*, 139.

2. Where an agreement is made between husband and wife, that the proceeds of a sale of the wife's land shall be invested in other land in the name of the wife, such agreement is within the provisions of the statute of frauds, and cannot be specifically enforced, but relief will be given the wife by declaring her to be entitled to the proceeds of her land, and *perhaps* to charge the land purchased with her money, with its payment. *Ibid.*

3. Where a husband contracts with his wife to invest money received from a sale of her land in other land, the title to which is to be taken to the wife, but instead he takes the title to himself, he must either execute his contract by conveying the land to his wife or restore to her the money which he received from her estate. *Ibid.*

RIPARIAN OWNER:

The riparian owner of land has the right, under our entry laws, to enter the water front up to deep water, for the purpose of erecting a wharf, and in such case, the title to the land passes. *Gregory* v. *Forbes*, 77.

ROADS:

1. The County Commissioners are vested by the statute with the power to lay out or discontinue public roads, and from their action an appeal lies to the Superior Courts in term, where the issues of fact are to be tried by a jury, and from that Court an appeal lies to the Supreme Court, as in other cases. *King* v. *Blackwell*, 322.

2. The main question to be determined as to the propriety of laying out a public road is, whether it is necessary for the public good and convenience. *Ibid.*

3. Where in such case, the applicants submitted an issue whether such proposed road was necessary, it was not error for his Honor to add the words "to the public." *Ibid.*

4. It is well settled that the omission of the trial Judge to charge the jury in a particular aspect of the case, is not ground for a new trial, when the complaining party did not ask for such a charge. *Ibid.*

5. Evidence that there are private ways near to the proposed location of the public road asked for, is competent both before the County Commissioners and the jury on an appeal to the Superior Court, to show that the proposed road is not necessary, because the private ways fulfilled all the public needs. *Ibid.*

6. The continuous use of a road as of right for the prescribed time is evidence of the acquirement of the easement, and in the absence of other evidence it is conclusive. *Willey* v. *R. R. Co.*, 408.

7. Interruptions of the use of an easement when brought to the knowledge of the claimant, rebut the presumption of a grant, unless such interruptions are promptly contested by the claimant and the easement reasserted. *Ibid.*

8. Interruptions of the use after the lapse of the time which raises the presumption of a grant of the easement, furnish evidence of, but do not constitute of themselves an abandonment. *Ibid.*

9. As the presumption of a grant will arise by an adversary and continuous use of an easement for twenty years, so a disuse occurring afterwards for the same length of time will raise a presumption of a surrender or extinction of the easement in favor of the servient tenement. *Ibid.*

10. Where the plaintiff had a right to use a road which ran over the right of way of a railroad corporation, the corporation has no right to obstruct such road, when such obstructions were not necessary for purposes of the corporation. *Ibid.*

RULE IN SHELLY'S CASE:

1. Where a will only gives the "use" of land to a devisee for life, with remainder to his heirs, the word "use" makes it clear that the devisor only intended to give a life estate to the first taker, and the rule in Shelly's case will not apply. *Jenkins* v. *Jenkins*, 254.

2. Where land is devised to the devisee for life, and after his death to be equally divided among the heirs of his body, the rule in Shelly's case does not apply and the heirs take as purchasers. *Ibid.*

3. So where by will the use of all the balance of the testator's estate, including lands, were devised to the devisee for his natural life, and at his death to be equally divided among the heirs of his body; *It was held*, that the rule in Shelly's case did not apply. *Ibid.*

4. The question is left open whether the rule in Shelly's case is abrogated by *The Code*, §1829. *Ibid.*

5. Where a will devised land to L during her natural life, and after her death to the begotten heirs or heiresses of her body; *It was held*, that the rule in Shelly's case did not apply, and the children of L took a remainder as purchasers after her death. *Leathers* v. *Gray*, 548.

RULES:

This Court will not recognize any agreement of counsel, if disputed, unless it appears of record, or is reduced to writing and filed in the cause. *Short* v. *Sparrow*, 348.

SALE OF LAND FOR ASSETS:

1. A creditor may sue the real representative of a deceased debtor to subject the descended lands to the payment of his debt, where there is danger of loss from delay, without waiting for the settlement of the personal estate by the administrator. *Syme* v. *Badger*, 197.

2. Where it is sought to subject the descended lands in the hands of the heir to the payment of the ancestor's debts, he has all the defences since the Act of 1846, which changed the procedure, that he would have had to a *sci. fa.* before that Act, with the qualification that when the action was brought against the heir within seven years after the qualification of the personal representative, on a judgment already obtained against the personal representative, the heir cannot plead that the demand on which the judgment was rendered was barred, unless he can show that the judgment was obtained by fraud or collusion. *Ibid.*

3. Under the provisions of the Act of 1715 if the debt be due at the death of the debtor an action must be brought within seven years from the death, otherwise both the heir and the executor will be discharged, and if the action arose after his death, the action must be brought

within seven years after the cause of action arose, or the Act will be a bar, provided the personal representative has paid over the assets. *Ibid.*

4. By the provisions of *The Code*, §153, subsec. 2, an action is absolutely barred against both the personal representative and the heir, unless it is brought within seven years after the qualification of the personal representative and the advertisement for creditors, and nothing will defeat its operation, except the disabilities mentioned in *The Code*, or such fraud or other matter of equitable nature as would make it against conscience to rely on the statute. *Ibid.*

5. Where an action was brought in 1877 against the administrator of a deceased executrix, charging a *devastavit*, which pended until 1885, when a judgment was rendered in favor of the plaintiff, who then at once brought an action to subject the lands in hands of the heir to the payment of the judgment; *It was held*, that the action was barred. *Ibid.*

6. Creditors of a deceased person have no lien upon his lands, but only the right to have them subjected to the payment of the debts if there shall be a deficiency of the personal assets, and consequently a conveyance made by the heir or devisee within two years after the grant of administration and advertisement for creditors is not absolutely void, but only subject to be annulled by the contingency of the personal assets proving insufficient. *Davis* v. *Perry*, 260.

7. Where a purchaser bought land from a devisee within the two years, and after the death of the purchaser his administrator sold the land to make assets, more than two years after the issuing of letters, &c., upon the estate of the devisor; *It was held*, that a purchaser at the sale to make assets got a good title as against the creditors of the devisor. *Ibid.*

8. In such case the administrator of the purchaser will hold the money received from the sale of the land in *lieu* thereof and subject to the claims of the creditors of the devisor. *Ibid.*

9. Where a devisee or heir at law sells land derived from the devisor or ancestor more than two years after the issuing of letters testamentary, &c., to a *bona fide* purchaser for value and without notice, such purchaser gets a good title against the creditors of the devisor or ancestor, but the devisee or heir holds the price received for the land in *lieu* thereof and subject to the claims of such creditors, just as the land would have been. *Ibid.*

10. A purchaser from an heir or devisee with notice, although after two years, holds the land subject to the claims of the creditors of the devisor or ancestor. *Ibid.*

11. Where the heir successfully pleads the statute of limitation to an action brought to foreclose a mortgage executed by his ancestor, but a judgment for the debt is obtained against the administrator; *quærr*, what will be the result of a proceeding by the administrator to sell the land to make assets to pay the judgment. *Fraser* v. *Bean*, 327.

12. Where a Special Proceeding was brought to sell land for assets, in pursuance of orders in which the land was sold, but on account of grave irregularities in this proceeding, another was brought with the consent of the administrator and purchaser, to which the heirs were parties; *It was held*, that such second proceeding was sufficient to cure the irregularities in the first, and none of the parties thereto could be heard to complain of it. *Ward* v. *Lowndes*, 367.

13. Where proceedings were brought before the Probate Judge which should have been brought before the Clerk, and *vice versa*, the irregularity is cured by the statute (Bat. Rev., ch. 17, §§ 425, 426). *Ibid.*

14. Infants may sue or be sued, and are as much bound by the judgment as persons *sui juris*, but infants must sue by a next friend or guardian, and defend actions against them by a regular guardian, or if they have none in this State, by a guardian *ad litem*. *Ibid.*

15. The provisions of the statute in regard to the appointment of guardians *ad litem* should be strictly observed, but mere irregularities in observing them, not affecting a substantial right, will not vitiate judgments and decrees obtained in the action or proceeding in which such irregularities exist. *Ibid.*

16. The facts that the administrator who sold the land for assets was the law partner of the counsel who conducted the proceeding; that many of the orders in the proceeding were in the handwriting of the administrator; that the answer of the guardian *ad litem* was also in his handwriting, it appearing that the guardian had taken all necessary steps to protect his wards; and that one of the attorneys for the administrator bid off the land for the purchaser, do not constitute such constructive fraud as to vitiate the judgment, when it is found as a fact that there was no actual fraud. *Ibid.*

17. A purchaser at a judicial sale, after he has paid the purchase money, may direct the commissioner to make title to another, and this furnishes no ground to set aside the order of sale. *Ibid.*

SCHOOLS:

1. The effect of the Acts of the General Assembly of 1883 and 1885 in relation to a graded school in Edenton was to supersede the organization of the school district within the same territory, and confer all the powers theretofore exercised by the school committee under the general law and transfer all moneys then in the treasury to the trustees created by said special enactments. *Skinner* v. *Bateman*, 5.

2. The school committee for the superseded district had no authority to contract or give orders for the payment for teaching a school therein after the passage of the Acts of 1883 and 1885; and it was no breach of the county treasurer's bond to refuse to pay upon their order, although at the time he had moneys in his hands apportioned originally to said district. *Ibid.*

3. A law which directs that the funds raised by taxation from the property of whites shall be devoted to the schools for white children, and those raised from the property of negroes shall be devoted to the schools for negroes, is unconstitutional and void. *Markham* v. *Manning*, 132.

SECRETARY OF STATE:

The clerk of the Secretary of State has no power to certify to and affix the great seal of the State to copies of grants and other papers from the Secretary of State's office, to be used in evidence. The statute contemplates that this officer should do all official acts himself and does not permit any of them to be done by a deputy. *Beam* v. *Jennings*, 82.

SEIZIN:

1. Possession alone does not constitute such a seizin as is necessary to support a claim for dower. *Efland* v. *Efland*, 488.

2. Where land was purchased and paid for by the husband, but the deed was made to a third party in order to defraud the creditors of the husband, he has no such seizin as will support a claim for dower on the part of his widow, although he was in possession of the land; but where land of which the husband was seized during coverture was sold at execution sale, and purchased by a third party with the money of the husband, and the title was made to the purchaser, with a like intent to defraud, the wife is entitled to dower. *Ibid.*

SERVICES:

1. If a grandparent receives his grandchild into his family as a member of it, they stand in the relation of parent and child, and no presumption is raised of a promise on the part of the grandparent to pay the grandchild for services rendered such as a child generally renders as a member of the family. *Dodson* v. *McAdams*, 149.

2. The presumption against the promise of the grandparent to pay for services in such case, may be overcome by evidence of an express promise on his part to pay for such services. *Ibid.*

3. Where the evidence was that a grandchild resided with her grandfather as a member of his family, and did household work for him, and he declared several times that he intended to give her a part of his property as he would his children, and that she should be paid for the services she rendered him; *It was held*, no sufficient evidence to go to the jury to prove a promise on the part of the grandfather to pay her for her services. *Ibid.*

4. The services of a child to its parent, or of a grandchild to whom the grandparent stands *in loco parentis* to such grandparent, are not gratuitous, but are presumed in the absence of evidence of an express promise, to be rendered as a recompense for the care and protection extended to the child. *Ibid.*

SHERIFF:

1. The right given by the statute to a sheriff to collect the taxes for which he is accountable, after he has gone out of office, does not bring him within the inhibition of Art. 14, §7, of the Constitution, so as to render him ineligible to hold another office. *McNeill* v. *Somers*, 467.

2. Where the statute imposes certain duties to be performed by an officer after the expiration of the term of office, their performance does not constitute a place or office of trust or profit so as to disqualify the former officer from holding another office at the same time. *Ibid.*

SPECIFIC PERFORMANCE:

1. Where a parol contract for the sale of land upon which money has been paid is repudiated, the vendor is required to return the money, for he will not be allowed to retain both the money and the land. *Cade* v. *Davis*, 139.

2. Where a husband contracts with his wife to invest money received from a sale of her land, in other land, the title to which is to be taken to the wife, but instead he takes the title to himself; he must either execute his contract by conveying the land to his wife, or restore to her the money which he received from her estate. *Ibid.*

3. In an action to compel the vendee to a performance of the contract, it is sufficient if the vendor can show a good title at any time before a final decree, although he did not have the title when the action was brought. *Hobson* v. *Buchanan*, 444.

4. A vendee is not entitled to recover costs in an action to force him to perform his contract and pay for the land if he contest the case and does not make a deposit of the amount due, although the plaintiff cannot make a good title at the time when the action is commenced. *Ibid.*

5. *It is intimated*, that the vendee could recover his costs in such case if he made deposit of the balance due and accepted the title as soon as the vendor had perfected it. *Ibid.*

STATUTE OF FRAUDS:

1. While trusts, unless annexed as an incident to a conveyance of the legal estate, cannot be raised by parol even when founded on a valuable consideration, they may be attached by agreement to such transferred estate and will be enforced. *Cade* v. *Davis*, 139.

2. Where an agreement is made between husband and wife, that the proceeds of a sale of the wife's land shall be invested in other land in the name of the wife, such agreement is within the provisions of the statute of frauds, and cannot be specifically enforced, but relief will be given the wife by declaring her to be entitled to the proceeds of her land, and *perhaps* to charge the land purchased with her money with its payment. *Ibid.*

3. Where a parol contract for the sale of land upon which money has been paid, is repudiated, the vendor is required to return the money, for he will not be allowed to retain both the money and the land. *Ibid.*

STATUTE OF LIMITATION:

1. The effect of §172 of *The Code* is to leave the law as it was prior to the adoption of the Code of Civil Procedure as regards the effect of a partial payment in removing the bar of the statute of limitations. *Bank* v. *Harris*, 118.

2. The fact that the maker of a note has a claim against the holder, which the holder endorses as a credit on the note without the assent of the maker, will not be such a partial payment as will rebut the statute of limitations, but an agreement to apply one existing liability to another is such a partial payment as will stop the operation of the statute, although the endorsement is never actually made on the note. *Ibid.*

3. Evidence that the plaintiff asked payment of a debt from the defendant, and that the defendant acknowledged that he owed something, and gave the plaintiff some property to be applied to the debt, which was entered as a credit on the bond sued on, is some evidence, taken with other circumstances, to rebut the presumption of payment from the lapse of time, although there is no evidence that at the time plaintiff was the owner of the bond sued on. *White* v. *Beaman*, 122.

4. Where land is left to a trustee to receive the profits and pay them over to one person during his life, and after his death to convey the legal estate to certain remainder-men, one of the remainder-men cannot get a possession adverse to the trustee and his co-remainder-men by taking possession under a deed from the person entitled to receive the rents for life. Such possession does not become adverse until after the death of the person entitled to the rents for life. *Hicks* v. *Bullock*, 164.

5. An adverse possession for twenty years by one tenant in common is necessary to bar his co-tenants. *Ibid.*

6. When an action is brought against an executor or administrator for a devastavit, and a judgment is obtained against him, the cause of action accrues at the time of the qualification, and the law in force at the time governs, but when the action is brought after the death of the executor, the cause of action accrues as against his real and personal representative, when such representative qualifies and gives notice to creditors. *Syme* v. *Badger*, 197.

7. A creditor may sue the real representative of a deceased debtor to subject the descended lands to the payment of his debt, where there is danger of loss from delay, without waiting for the settlement of the personal estate by the administrator. *Ibid.*

8. Where it is sought to subject the descended lands in the hands of the heir to the payment of the ancestor's debts, he has all the defences since the Act of 1846, which changed the procedure, that he would have had to a *sci. fa.* before that Act, with the qualification that when the action was brought against the heir within seven years after the qualification of the personal representative, on a judgment already obtained against the personal representative, the heir cannot plead that the demand on which the judgment was rendered was barred, unless he can show that the judgment was obtained by fraud or collusion. *Ibid.*

9. Under the provisions of the Act of 1715, if the debt be due at the death of the debtor, an action must be brought within seven years from the death, otherwise both the heir and the executor will be discharged, and if the action arose after his death, the action must be brought within seven years after the cause of action arose, or the Act will be a bar, provided the personal representative has paid over the assets. *Ibid.*

10. By the provisions of *The Code*, §153, subsec. 2, an action is absolutely barred against both the personal representative and the heir, unless it is brought within seven years after the qualification of the personal representative and the advertisement for creditors, and nothing will defeat its operation, except the disabilities mentioned in The Code, or such fraud or other matter of equitable nature as would make it against conscience to rely on the statute. *Ibid.*

11. Where an action was brought in 1877 against the administrator of a deceased executrix, charging a *devastavit*, which pended until 1885, when a judgment was rendered in favor of the plaintiff, who then at once brought an action to subject the lands in hands of the heir to the payment of the judgment; *It was held*, that the action was barred. *Ibid.*

12. The statute of limitations will run in favor of one who has converted chattels and applied them to his own use, although the true owner may be ignorant of the conversion. *University* v. *The Bank*, 280.

13. Public securities, such as State bonds, may be converted by returning them under an assertion of a right to hold them in defiance of the true owner, as well as other property. *Ibid.*

14. Where a trust is created by the agreement of the parties no length of time will bar the *cestui que trust*, for the possession of the trustee cannot be adverse, unless the trustee repudiate the trust by clear and unequivocal acts or words brought to the notice of the *cestui que trust*,

but when it is sought to convert a party who has the legal title into a trustee by a decree, he may insist that his possession was adverse, and be protected by the statute of limitations. *Ibid.*

15. So where an express trustee conveys the trust property in breach of the trust, and his grantee continues to hold adversely, the statute will run in his favor. *Ibid.*

16. In causes of action, which under the former practice could have been brought in a Court of law or a Court of equity, the Court of equity will be bound by the statute of limitations as much as the Court of law would. *Ibid.*

17. An action to foreclose a mortgage, where no part of the mortgage debt has been paid and the mortgagor remains in possession, is barred in ten years from the forfeiture, and the same rule applies where the mortgagor died before the time expired and the action is brought against his heirs. *Fraser* v. *Bean*, 327.

18. The provisions of *The Code*, §152, par. 3, only bars an action to foreclose the mortgage, and does not bar an action to recover the debt secured by the mortgage. *Ibid.*

19. Where the heir successfully pleads the statute of limitation to an action brought to foreclose a mortgage executed by his ancestor, but a judgment for the debt is obtained against the administrator; *quære*, what will be the result of a proceeding by the administrator to sell the land to make assets to pay the judgment. *Ibid.*

20. As the presumption of a grant will arise by an adversary and continuous use of an easement for twenty years, so a disuse occurring afterwards for the same length of time will raise a presumption of a surrender or extinction of the easement in favor of the servient tenement. *Willey* v. *R. R. Co.*, 408.

21. Where it is sought to directly attack and have declared void the action of the Commissioners in declaring the result of an election, the action need not be brought until some action is proposed to be taken under the alleged election. *McDowell* v. *Cons. Co.*, 514.

22. So, where an election was held in 1883 for the purpose of obtaining authority to issue bonds in aid of a railroad corporation, which the Commissioners declared to have been ratified by a majority of the qualified voters, but it was not attempted to issue the bonds until 1886; *It was held*, that an action brought to attack the finding of the Commissioners when they attempted to issue the bonds was not barred. *Ibid.*

SUBROGATION:

Where, after a sale of land to make assets, the heir at law mortgages his interest in the land, the mortgage has the effect of putting the mort-

gagee in the place of the mortgagor, so that he is entitled to what remains after the payment of the debts, to the amount of his mortgage. *Dancy* v. *Duncan*, 111.

SUMMONS:

(See PROCESS.)

SUPERSEDEAS BOND:

1. A bond to stay execution, which provides that the obligors will be responsible for any damages which may arise on account of the acts of the appellant in committing waste, &c., is not a *supersedeas* bond within the meaning of *The Code*, §§435, 554; which contemplate a bond upon which summary judgment may be rendered in the Supreme Court upon the affirmation of the judgment of the Court below. *Alderman* v. *Rivenbark*, 134.

2. Where the undertaking on appeal for the costs and the undertaking to stay execution are in one instrument, the appellee, upon filing the proper proofs of the insolvency of the surety, is entitled to have the appeal dismissed, as prescribed by *The Code*, §554, but where the two undertakings are separate and distinct, the appellant has a right to have his appeal heard, although the surety to the undertaking to stay execution is insolvent. *Ibid.*

TAXATION:

1. A majority of the qualified voters, and not merely of those voting, is necessary to enable a municipal corporation to loan its credit or contract a debt. *Southerland* v. *Goldsboro*, 49; *Duke* v. *Brown*, 127; *Markham* v. *Manning*, 132.

2. The word "estate" has a broader meaning than the word "property." The latter word does not include choses in action, unless there be something in the context which would require it to receive this interpretation. *Vaughan* v. *Murfreesboro*, 317.

3. So where a statute allowed a municipal corporation to levy a tax upon all persons and property within the town; *It was held*, that this did not authorize a tax on solvent credits, money, or bonds. *Ibid.*

4. Where the defendant executed his bond to a municipal corporation for a license tax, instead of paying cash, he is estopped from setting up as a defence that the municipal authorities had no power to take such bond, and issue the license, and consequently that the bond was void. *Hendersonville* v. *Price*, 423.

5. While the Board of Commissioners of a municipal corporation cannot issue a license to retail liquors for a longer period than one year, the time need not begin and terminate with the term of office of the Board which grants it, for they can grant a license which extends beyond their term of office, provided that it does not exceed one year, and does not begin to take effect after their term of office has expired. *Ibid.*

6. The right given by the statute to a sheriff to collect the taxes for which he is accountable, after he has gone out of office, does not bring him within the inhibition of Art. 14, §7, of the Constitution, so as to render him ineligible to hold another office. *McNeill* v. *Somers*, 467.

TENANTS IN COMMON:

1. Where land is left to a trustee to receive the profits and pay them over to one person during his life, and after his death to convey the legal estate to certain remainder-men, one of the remainder-men cannot get a possession adverse to the trustee and his co-remainder-men by taking possession under a deed from the person entitled to receive the rents for life. Such possession does not become adverse until after the death of the person entitled to the rents for life. *Hicks* v. *Bullock*, 164.

2. An adverse possession for twenty years by one tenant in common is necessary to bar his co-tenants. *Ibid.*

TORTS:

1. An infant is liable both civilly and criminally for his torts, and in an action for damages it is immaterial that the tort was committed by the direction of one having authority over the infant. *Smith* v. *Kron*, 392.

2. While infants are incapable of making a contract with an agent either express or implied, so as to bind them for his torts committed in pursuance of the agency; *It seems*, that an infant is liable for torts committed by his agent in the necessary prosecution of the business of the agency under the maxim, *qui facit per alium, facit per se. Ibid.*

TRANSFER OF STOCK:

It is intimated, that the purchaser of shares of an incorporated company, at a sale under an attachment against the party who appears on the stock-book of the corporation to be the owner, gets a title superior to that of a transferee from such apparent owner, who has not had the transfer made on the books of the corporation. *Morehead* v. *The R. R. Co.*, 362.

TROVER:

1. Conversion consists either in the appropriation of the thing to the party's own use; or in its destruction; or in exercising dominion over it in exclusion or defiance of the plaintiff's rights; or in withholding the possession from the plaintiff, under a claim of title, inconsistent with that of the plaintiff, but it must be by *acts*, as bare words will not amount to a conversion. *University* v. *The Bank*, 280.

2. In the case of a conversion by a wrongful taking of the chattel it is not necessary to prove a demand and refusal; and so the wrongful assumption of the property and of the right of disposing of it, may be a conversion in itself, and render a demand and refusal unnecessary. *Ibid.*

3. The statute of limitations will run in favor of one who has converted chattels and applied them to his own use, although the true owner may be ignorant of the conversion. *Ibid.*

4. Public securities, such as State bonds, may be converted by returning them under an assertion of a right to hold them in defiance of the true owner, as well as other property. *Ibid.*

TRUSTS:

1. While trusts, unless annexed as an incident to a conveyance of the legal estate, cannot be raised by parol even when founded on a valuable consideration, they may be attached by agreement to such transferred estate and will be enforced. *Cade* v. *Davis*, 139.

2. Where an agreement is made between husband and wife that the proceeds of a sale of the wife's land shall be invested in other land in the name of the wife, such agreement is within the provisions of the statute of frauds, and cannot be specifically enforced, but relief will be given the wife by declaring her to be entitled to the proceeds of her land, and *perhaps* to charge the land purchased with her money, with its payment. *Ibid.*

3. Where a husband contracts with his wife to invest money received from a sale of her land, in other land, the title to which is to be taken to the wife, but instead he takes the title to himself, he must either execute his contract by conveying the land to his wife, or restore to her the money which he received from her estate. *Ibid.*

4. Where by will land is devised to a trustee, to rent the land and pay the rents over to a person during his life, the *cestui que trust* takes no estate in the land, but only the right to have the rents paid to him. *Hicks* v. *Bullock*, 164.

5. Where a trust is created by the agreement of the parties, no length of time will bar the *cestui que trust*, for the possession of the trustee cannot be adverse, unless the trustee repudiate the trust by clear and unequivocal acts or words brought to the notice of the *cestui que trust*, but when it is sought to convert a party who has the legal title into a trustee by a decree, he may insist that his possession was adverse, and be protected by the statute of limitations. *University* v. *The Bank*, 280.

6. So where an express trustee conveys the trust property, in breach of the trust, and his grantee continues to hold adversely, the statute will run in his favor. *Ibid.*

7. A widow is not entitled to dower in an equity, unless the husband had such an equitable estate as could be enforced in a Court of equity. *Efland* v. *Efland*, 488.

8. If the administrator pays the balance due out of the assets of the estate, but takes the title to himself individually, the heirs can have him decreed to be a trustee for them; or, *it seems*, that they can charge him with the payment as for a *devastavit*, and have it declared a charge on the land. *Jones* v. *Slaughter*, 541.

USURY:

1. Where a mortgage is executed to secure a usurious note the usury only affects the interest and does not impair the validity of the mortgage. *Spivey* v. *Grant*, 214.

2. Where the charter of a corporation allowed it to borrow money on such terms as its directors might determine upon, and to issue bonds or other evidences of indebtedness; *It was held*, that this provision allowed it to sell its bonds below their face value, and where it did so the loan was not for that reason usurious. *Bank* v. *M'f'g Co.*, 298.

3. A provision in a charter allowing a corporation to *lend* money at a usurious rate of interest does not confer the power on them to do so, but a provision to *borrow* money at such rate is not liable to any objection. *Ibid.*

VARIANCE:

1. Where the answer alleged as a counter-claim, that the note sued on was endorsed to the plaintiff after maturity, and that the endorser was indebted to the defendant before the transfer of the note, for money paid by him as his surety, and the evidence offered to support it was a joint and several note, executed by the defendant and another party, who it was alleged was the agent of the endorser of the plaintiff, but nothing in the note offered in evidence showed any agency; *It was held*, a failure of proof, and the Court below properly charged the jury that there was no evidence to support the allegation of the counter-claim. *Smith* v. *McGregor*, 101.

2 Where several persons unite in executing a bond to a commission merchant for supplies to be furnished them, and one of them gives a chattel mortgage to secure the amounts advanced to him, which mortgage erroneously recites the amount of the bond, but truly specifies the amount of the advances made to the mortgagor; *It was held*, that the variance was immaterial. *Spivey* v. *Grant*, 214.

3. Where a variance is not merely formal, but lies at the very root of the cause of action, it is fatal to the plaintiff's right to recover. *Pendleton* v. *Dalton*, 507.

4. So where a suit was brought on a contract alleged to have been made with a decedent, and for the benefit of his estate, but the evidence showed that he was not a party to the contract in its origin, nor did he ever acquire an interest in it by assignment, the variance was fatal, and the plaintiff was properly nonsuited. *Ibid.*

VENDOR AND VENDEE:

1. One let into possession of land under a contract to purchase, is an occupant at the will of the vendor, and he so continues until the purchase money is paid. *Allen* v. *Taylor*, 37.

2. In such case, the vendor may, after reasonable notice to quit, demand possession, and if the possession is not surrendered, he may bring his action at once. *Ibid.*

3. What is reasonable notice to quit will depend on the circumstances of each case. *Ibid.*

4. While a Court of Equity will hold a vendor who has received the full price for land as a trustee for the vendee, and compel him to convey the legal title, yet before the purchase money is paid, it will not deprive him of any of his rights, legal or equitable, and one of these is the right to hold possession of the land, in the absence of a stipulation to the contrary in the contract. *Ibid.*

5. A vendee failing to pay the purchase money has no right to have the land sold as of course, and a Court of Equity will not direct a sale at his instance, unless it appears that the land will sell for a sum sufficient to pay the debt, and that he is unable to pay it without a sale. *Ibid.*

6. The vendor of land who has not been paid, has two remedies, one *in personam* against the vendee, the other *in rem* to subject the land, and he may pursue both of these at the same time, and may also maintain an action to recover the possession. *Ibid.*

7. Where a vendee is let into possession before the purchase money is paid, and the vendor brings an action to recover the possession, the defendant must file the undertaking to secure rents and damages provided for by *The Code*, §237, before he will be allowed to answer. *Ibid.*

8. Where a parol contract for the sale of land upon which money has been paid, is repudiated, the vendor is required to return the money, for he will not be allowed to retain both the money and the land. *Cade* v. *Davis*, 139.

9. In an action to compel the vendee to a performance of the contract, it is sufficient if the vendor can show a good title at any time before a final decree, although he did not have the title when the action was brought. *Hobson* v. *Buchanan*, 444.

10. A vendee is not entitled to recover costs in an action to force him to perform his contract and pay for the land, if he contest the case and does not make a deposit of the amount due, although the plaintiff cannot make a good title at the time when the action is commenced. *Ibid.*

11. *It is intimated*, that the vendee could recover his costs in such case, if he made deposit of the balance due, and accepted the title as soon as the vendor had perfected it. *Ibid.*

12. Where a vendee dies before paying in full for the land, his estate is liable for the residue, and its payment by the administrator is proper. *Jones* v. *Slaughter*, 541.

VERDICT:

It was agreed that the clerk might take the verdict, but by permission of the Court he was absent when the jury agreed and they sealed their verdict up and handed it to the sheriff and separated. At the next session of the Court the trial Judge ordered the jury into the box and the foreman opened the verdict and each juror agreed to it in the presence of the counsel for both sides; *Held*, that the verdict was regular, there being no suggestion that either the verdict or the jury had been tampered with. *King* v. *Blackwell*, 322.

WARRANTY:

1. The application for insurance forms a part of the contract, and the inquiry and answers are tantamount to an agreement that the matter enquired about is material, and its materiality is not open to be tried by the jury. *Cuthbertson* v. *Ins. Co.*, 480.

2. In the absence of fraud or mistake a party will not be heard to say that he was ignorant of the contents of a writing signed by him, containing a contract on his part. *Ibid.*

3. So where a party signed an application for insurance which contained a warranty that the property belonged to the applicant in fee, and that there were no liens on it, he will not be allowed to testify that he did not know that such a fact was stated in the application. *Ibid.*

4. Where an application for insurance contained a statement which was made a warranty by the terms of the policy, that the house in which the insured property was belonged to the applicant in fee, and that there were no liens on the property insured; *It was held*, that the warranty was broken when it appeared that the house was built on land leased by the applicant, and was to become the property of the lessor at the end of the lease, and that the title to the property insured was vested in another person as a security for the purchase money. *Ibid.*

5. Where several distinct kinds of property are insured in the same policy, and there is a false statement in the application as to some of it, it avoids the policy as to all, as the policy is one entire and indivisible contract. *Ibid.*

WHARFS:

The riparian owner of land has the right, under our entry laws, to enter the water front up to deep water, for the purpose of erecting a wharf, and in such case, the title to the land passes. *Gregory* v. *Forbes*, 77.

WILL:

1. Where by will land is devised to a trustee, to rent the land and pay the

rents over to a person during his life, the *cestui que trust* takes no estate in the land, but only the right to have the rents paid to him. *Hicks* v. *Bullock*, 164.

2. Courts of equity will not entertain a suit for the construction of a devise, but will leave the devisee to assert his right at law, in an action to recover the land. *Woodlief* v. *Merritt*, 226.

3. Prior to January 1, 1856, when the Revised Code went into effect, a will which was attested by two witnesses, could be proved in common form by the oath and examination of one of them only. Since that time, it must be proved by at least two of the subscribing witnesses, if living. *Jenkins* v. *Jenkins*, 254.

4. Where a will only gives the "use" of land to a devisee for life, with remainder to his heirs, the word "use" makes it clear that the devisor only intended to give a life estate to the first taker, and the rule in Shelly's case will not apply. *Ibid.*

5. Where land is devised to the devisee for life, and after his death to be equally divided among the heirs of his body, the rule in Shelly's case does not apply and the heirs take as purchasers. *Ibid.*

6. So where by will the use of all the balance of the testator's estate, including lands, were devised to the devisee for his natural life, and at his death to be equally divided among the heirs of his body; *It was held*, that the rule in Shelly's case did not apply. *Ibid.*

7. The question is left open whether the rule in Shelly's case is abrogated by *The Code*, §1829. *Ibid.*

8. A will in one clause devised a tract of land to the testator's son W. In another clause a pecuniary legacy to a daughter was made an express charge on this land, and in the same clause another tract of land was devised to another son, C, and a pecuniary legacy to another daughter, I. This last legacy was not made an express charge on the land devised to C, but the will provided that the son W of the testator should manage the entire estate, including the land devised to C, until the legatees and devisees arrived at full age, and that he should pay the legacy to I by installments; *It was held*, that the legacy to I was a charge on the land devised to C. *Carter* v. *Worrell*, 358.

9. Where a devise described the devised land as containing two hundred acres, the area cannot control the boundaries by which the land is also described in the deed. *Lyon* v. *Lyon*, 439.

10. In doubtful cases the area may aid in determining the boundaries, but when it is at variance with them it must be disregarded. *Ibid.*

11. Where a will devised land to L during her natural life, and after her death to the begotten heirs or heiresses of her body; *It was held*, that the rule in Shelly's case did not apply, and the children of L took a remainder as purchasers after her death. *Leathers* v. *Gray*, 548.